Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

MATTHEW WIGGENHORN, ET AL.,
Petitioners,

v.

AXA EQUITABLE LIFE INSURANCE COMPANY
FORMERLY KNOWN AS EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 30, 2009

QUESTION PRESENTED

The Securities Litigation Uniform Standards Act of 1998 (SLUSA) bars state-law class actions alleging untrue statements, misrepresentations, material omissions, manipulation or deceptive devices or contrivances. The methodology respondents use to calculate the unit price of their variable annuities sometimes fails to account for substantial late-day movements in U.S. markets. This creates short-term trading opportunities for arbitrageurs who are able to buy annuity units at a favorable price and shortly thereafter redeem at a substantial profit, all at the expense of long-term annuity owners. Petitioners allege that respondents have negligently exposed them to these investment-diluting, arbitrage trading practices through respondents' pricing methodologies and their failure to prevent such short term trading in the annuities. The question presented is:

Whether SLUSA bars petitioners' state-law class actions in which they allege that respondents' pricing practices and failure to prevent arbitrage in the annuities was negligent?

LIST OF PARTIES TO THE PROCEEDINGS

Matthew Wiggenhorn, Edmund Woodbury, Nitika Mehta, and Paula Beals (all of whom filed suit as individuals* and on behalf all others similarly situated) were plaintiffs in the district court and appellants in the court of appeals.

The following were defendants in the district court and appellees in the court of appeals, and are respondents here:

AXA Equitable Life Insurance Company, formerly known as The Equitable Life Assurance Society Of The United States

The Variable Annuity Life Insurance Company

Nationwide Life Insurance Company

AIG SunAmerica Life Assurance Company

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* Nitika Mehta filed suit individually as Trustee of the N.D. Mehta Living Trust.

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Matthew Wiggenhorn, Edmund Woodbury, Nitika Mehta, and Paula Beals respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in their respective cases.

INTRODUCTION

These four consolidated cases involve a frequently litigated issue of securities law of exceptional importance to the division of federal and state authority, to the jurisdiction and administration of the federal courts, and to the investing community. The circuits are deeply divided on the question presented which has overlapping jurisdictional and substantive facets.

The Securities Litigation Uniform Standards Act of 1998 (SLUSA) allows removal and requires dismissal of state-law class actions alleging misrepresentation or omissions of material fact in connection with the purchase or sale of a covered security. Petitioners are investors in variable annuities they purchased from the respondent insurance companies. Petitioners have sued respondents alleging they negligently failed to calculate share prices, accurately, thereby exposing petitioners to an investment-diluting practice known as "stale price trading" or "market timing" (a practice that costs investors an estimated $5 billion every year[1]).

Market timing involves arbitrageurs trading on time differences between the closing of U.S. markets and foreign exchanges. The practice dilutes

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[1] *See* United States Government Accountability Office, *Mutual Fund Trading Abuses: Lessons Can Be Learned from SEC Not Having Detected Violations at an Earlier Stage* 4-5 (Apr. 2005) ("GAO Report"), *available at* ttp://www.gao.gov/new.items/d05313.pdf.

the value of long-term annuity owners' investment, and the market timer's arbitrage profit comes dollar-for-dollar out of long-term investors' pockets. Respondents contended below that those allegations constitute state law claims for misrepresentations or omissions barred by SLUSA.

The Fourth Circuit agreed with that proposition, despite its acknowledgment that petitioners had asserted only the single claim that respondents had negligently exposed petitioners' investments to market timing and despite petitioners' explicit disavowals in their complaints of "any claims" based on any untrue statements, any failures to disclose any material fact, or any manipulative or deceptive device or contrivance respondents may have made. Pet. App. 43a (¶ 55).

The Fourth Circuit's decision is not an aberration, but rather reflects a pervasive confusion among the circuits concerning the proper scope of SLUSA's bar against state-law class actions alleging misrepresentation, omissions, manipulation, or deceptive devices or contrivances. The courts of appeals have applied markedly different tests for determining when SLUSA applies to a claim. The Third Circuit applies (as do some district courts) a "factual predicate" (or "necessary component") test under which only those allegations giving rise to liability are taken into account. Regardless of the words and labels appearing in the complaint, if a misrepresentation or omission (whether explicitly or only implicitly alleged) is a "factual predicate" or "necessary component" of a claim, SLUSA bars the claim. Conversely, non-essential allegations which a plaintiff need not prove to recover do not matter for SLUSA purposes under the Third Circuit test.

The Seventh Circuit has applied a far broader test. In the Seventh Circuit's view, allegations a plaintiff has not made but "could have" made bring their claims within the reach of SLUSA and are prohibited. The Eighth Circuit held that plaintiffs who had explicitly disavowed allegations of fraud, misrepresentation, and non-disclosure nevertheless ran afoul of SLUSA. The court did not point out which remaining allegations triggered SLUSA's bar; rather, the it merely held that whatever those allegations were, they somehow "essentially" and "in substance" alleged misstatements, non-disclosures and deceptive devices and contrivances. Similarly in the present case, after noting that petitioners had only alleged that respondents negligently exposed their investments to an arbitrage practice, the Fourth Circuit still adopted the district court's explanation (unsupported by any citation to or quotation of the complaints) that petitioners had alleged a "misrepresentation" concerning the value of a security.

This Court's review is urgently needed to restore clarity and coherency to the test for determining if and when allegations in a complaint trigger SLUSA's class action bar. As its name implies, the Securities Litigation Uniform Standards Act was intended to bring *uniformity* to the body of law governing securities fraud class actions. Ironically, judicial interpretations of straightforward statutory text have not only yielded a morass of conflicting decisions, courts faced with identical allegations have reached diametrically opposed results. This Court should intervene and restore a uniform standard.

OPINIONS BELOW

The circuit court's *per curiam* opinion (Pet. App. 1a) is unreported in the Federal Reporter (but

available at 2009 WL 225931). The district court's opinion dismissing petitioners' cases (Pet. App. 8a) is reported at 437 F.Supp.2d 439.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2009, making this petition due on April 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at Pet. App. 115a.

STATEMENT OF THE CASE

A. The Statutory Framework

In 1995, Congress passed the Private Securities Litigation Reform Act ("PSLRA") (codified in part at 15 U.S.C. §§ 77z-1, 78u) to prevent meritless class actions alleging fraud in the securities market. *See* H.R. Conf. Rep. No. 105-803, at 13 (1998). To deter those suits, the PSLRA imposes stringent pleading and other procedural requirements on securities class-action plaintiffs. To avoid the PSLRA's requirements, plaintiffs increasingly brought suit against issuers in state court alleging securities fraud under state statutory or common law.

To prevent private plaintiffs from circumventing the PSLRA, Congress passed SLUSA, which added to the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") identical provisions that preclude certain class actions based on state law. Specifically, SLUSA's preemption provision states:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in

> any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative[2] or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b); *accord id.* § 78bb(f)(1). SLUSA also authorizes such actions to be removed to federal court. *Id.* § 77p(c); *accord id.* § 78bb(f)(2). Following removal, if the district court determines that the action is not in fact within the scope of SLUSA's preemption provision, it must remand the action to state court. *See id.* §§ 77p(d)(4), 78bb(f)(3)(D).

B. Petitioners' Common-Law Claims

Petitioners are investors in variable annuities which are hybrid investments sold by insurance companies containing both securities and insurance features. The securities feature permits

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[2] "'Manipulation' is 'virtually a term of art when used in connection with securities markets.'" *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)). "The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Id.* "[W]e do not think [Congress] would have chosen this 'term of art' if it had meant to bring within the scope of § 10(b) instances of corporate mismanagement such as this, in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary." *Id.* at 477. The courts below apparently did not deem worthy of comment any suggestion that petitioners have alleged "manipulation" within the meaning of federal securities laws.

investments in securities markets through the variable annuity, and the insurance feature provides the investor periodic payments over time, with a death benefit to the beneficiary upon the investor's death. Unlike a fixed annuity which guarantees a set rate of return to the annuity owner in the form of periodic payments of a sum certain, the amount of the periodic payments to a variable annuity owner varies with the returns on the investments the owner has selected. In these four cases, the variable annuities offered investors mutual funds in which they could invest, and petitioners' rate of return on their variable annuities depended upon the performance of the mutual funds they selected.

When an investor purchases a variable annuity, the money he invests is deposited into a "separate account" used to keep investors' funds separate from those of the insurance company. The separate account consists of multiple sub-accounts, each of which corresponds to a particular mutual fund. The investor is credited with a number of "accumulation units,"[3] the exact number depending on how much money the investor deposits into a sub-account and the value of accumulation units in that sub-account.

Unlike stocks that are traded continuously throughout the course of a trading day with fluctuating prices determined by market forces, the value of an accumulation unit is mechanically calculated once each day at 4 p.m. Eastern Time according to a set formula: dividing the sub-accounts net assets (total assets minus total li-

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[3] For the description of how sub-accounts work, the district court used the terminology used by Nationwide. Pet. App. at 11a n.6. For the sake of convenience, we will do the same.

abilities) by the number of outstanding accumulation credits in the sub-account. The assets of the sub-account consist of mutual fund shares which are purchased from the particular mutual fund corresponding to that particular sub-account. The mutual fund shares are purchased with the pooled funds of all investors who have invested in any particular sub-account.

Similarly, the price at which one share of a mutual fund is sold or redeemed is also mechanically calculated once each day at 4 p.m. Eastern Time according to a set formula: the net value of the fund's portfolio of securities (total assets minus total liabilities), known as the fund's net asset value (NAV), divided by the number of outstanding shares. The mutual funds offered as investment options in the variable annuities in these cases included in their investment portfolios securities that are traded in securities markets outside the United States, such as London, Paris, Frankfurt, Moscow, Tokyo and Sydney.

In calculating the price of a mutual fund share, respondents value the mutual fund assets using the final closing price of the foreign security in its home market. When the NAV is calculated at 4 p.m. Eastern Time, the closing prices of those foreign securities are 5 to 15 hours old. As the district court explained:

> Because most mutual funds calculate their net asset value per share ("NAV") only once per day – at the close of the New York Stock Exchange – there is a potential that the NAV will become "stale" because it does not incorporate the most recent market information. Roberto M. Braceras, *Late Trading and Market Timing*, 37 Rev. Sec. & Commodities Reg. 61, 64 (April 14, 2004). "This is most com-

> mon in mutual funds that invest in international securities, where the markets close many hours before the U.S. market. For example, if U.S. stocks rally after the international markets have closed for the day, the value of the international securities on that day will not reflect the rise in the U.S. market." *Id.*

Pet. App. at 9a n.3. If the closing prices of foreign securities have become stale, use of that stale closing price in the NAV calculation results in artificially high or artificially low mutual fund share prices. For example, if the U.S. market rallies after the close of Asian and European markets, investors can predict that those markets will likewise rise when trading begins their next trading day, and a share price based on the foreign securities' closing price in those markets will be artificially low.

It is important to note that such artificially low or high mutual fund share prices result strictly from the use of the true, actual closing prices of the foreign securities; those actual prices have simply become stale (not false) by virtue of the passage of time and occurrence of U.S. market events. Similarly, the artificially low or high mutual fund share prices and correspondingly low or high accumulation unit prices are not false, either. They are the actual prices respondents calculated for the fund shares and accumulation units, and they are the true prices at which respondents executed all purchase and redemption orders for the accumulation units.

Every purchase of a variable annuity accumulation unit which corresponds to a mutual fund share at an artificially low price dilutes the value of the investments of all existing, non-trading an-

nuity owners because the purchaser acquires a larger interest in the annuity sub-account than if respondents had calculated the NAV more accurately. Similarly, every redemption of a share at an artificially high price reduces the value of the investments of non-trading shareholders because the redemption depletes their pooled assets more than if the fund had not relied on stale prices.

One of the ways in which respondents could have protected long-term investors from market timing (but did not) is "fair value pricing" – that is, make adjustments to the values of foreign securities prior to calculating the NAV. When a fund holds assets that trade in competitive markets, it must ordinarily value those assets at their market price, unless market quotations are not readily available. *See* 15 U.S.C. § 80a-2(a)(41)(B)(ii); 17 C.F.R. § 270.2a-4(a). According to the SEC, market quotations "with regard to a foreign security" are not "readily available" if "a significant event ... has occurred after the foreign exchange or market has closed, but before the fund's NAV calculation." Investment Company Institute, SEC No-Action Letter, 2001 WL 436249, at *3 (April 30, 2001). According to the SEC, a "significant event" is "an event that will affect the value of a portfolio security." *Id.* When a fund determines that an event that will affect the value of a portfolio security "has occurred since the closing of the foreign exchange or market, but before the fund's NAV calculation, then the closing price for that security would not be considered a 'readily available' market quotation, and the fund must value the security pursuant to a fair pricing methodology." *Id.*

C. Proceedings Below

In their original complaints, petitioners alleged that respondents negligently[4] or recklessly[5] exposed petitioners' investments to dilution from market timing. The complaints alleged that, because respondents should have known of the existence of market timing and of alternative pricing procedures that would prevent it, respondents breached their duties of care to petitioners and similarly situated investors.[6] For example, petitioners alleged that respondents failed to make pricing adjustments based on correlations between movements in the U.S. and foreign markets.[7]

Petitioners also alleged in separate counts that respondents' exposure of petitioners to market timing constituted a breach of fiduciary duty, and additionally, that respondents' failure to provide complete and truthful information about market timing was also a breach of fiduciary duty. In her original complaint, Nitika Mehta added a fourth count against AIG alleging that AIG's conduct was fraudulent and deceptive under California's Business & Professions Code.

Respondents removed the lawsuits to federal district court. Equitable moved for dismissal and AIG moved for judgment on the pleadings on various grounds including SLUSA's prohibition of

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[4] Pet. App. 13a (¶ 2). The district court concluded that all of the complaints were "materially indistinguishable." 9a (¶2). For simplicity's sake, all references in this brief are to the *Wiggenhorn* complaint which appears in the Appendix beginning at 41a.

[5] Pet. App. 13a (¶ 2).

[6] Pet. App. 80a-81a (¶ 46).

[7] Pet. App. 71a (¶ 32).

class actions based on state law and alleging misrepresentation or omission in the sales of securities. Petitioners moved for remand of all four cases based on lack of subject-matter jurisdiction.

At the time, numerous district courts and three Circuits had unanimously held that SLUSA applied only to the state law fraud claims of securities purchasers or sellers but not holders. *See, e.g., Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 43 (2d Cir. 2005) ("this holding aligns us with every circuit court that has considered the question thus far") *rev'd* 547 U.S. 71 (2006); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334 (11th Cir. 2002); *Green v. Ameritrade, Inc.*, 279 F.3d 590 (8th Cir. 2002). Accordingly, petitioners moved to remand their cases to state court on the grounds they had only alleged holder claims and no claim "in connection with" the purchase or sale of securities and that the cases were not otherwise within the district court's subject matter jurisdiction.

Before the resolution of any of those motions, the cases were transferred to the multidistrict proceedings pending in the District of Maryland. Once in Maryland, the other two defendants eventually filed their own motions to dismiss.

In 2005, the Seventh Circuit became the first court to hold that SLUSA barred holder claims as well as those of purchasers and sellers. *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005), *vacated on jurisdictional grounds* 547 U.S. 633 (2006). As the district court below recounted:

> the plaintiffs filed amended complaints, either immediately before the transfer [to the MDL proceedings] or shortly thereafter, that eliminate any explicit mention of misrepresentation and deception, and that plead only

> one cause of action: common law negligence. Specifically, the complaints allege that the defendants acted negligently by failing to (1) evaluate "price relevant information" after the close of the foreign securities markets and adjusting the value of sub-account [accumulation units] accordingly, and (2) implement policies and procedures to protect policyholders from the dilutive effect of stale price trading.

Pet. App. 14a (¶2). Moreover, petitioners explicitly disavowed in their amended complaints "any claims" based on any untrue statements, any failures to disclose any material fact, or any manipulative or deceptive device or contrivance respondents may have made. Pet. App. 54a (¶ 55). In response to the amended complaints, respondents again moved to dismiss.[8]

The next year, this Court decided *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006), and agreed with the Seventh Circuit's holding that SLUSA precludes the state law fraud claims of securities holders, just as it precludes the state law fraud claims of securities purchasers and sellers. A few months later, the district court dismissed petitioners' claims. The court explained:

> "The element of a misrepresentation or omission of a material fact is satisfied when a plaintiff alleges a misrepresentation concerning the value of the securities sold or the consideration received in return." *Araujo v.*

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[8] Petitioner Mehta did not file an amended complaint because AIG had already moved for judgment on the pleadings rather than to dismiss, thus cutting off her right to amend once as of right. AIG then objected to Mehta's attempt to amend.

> *John Hancock Life Ins. Co.*, 206 F.Supp.2d 377, 382 (E.D.N.Y. 2002). That is exactly what the plaintiffs have done here, despite their emphatic disavowal of their prior explicit allegations of misrepresentation, and their pared-down amended complaint. Putting aside the convoluted terminology and formulas associated with variable annuities, at bottom the plaintiffs simply allege that the defendants incorrectly priced certain investment options provided under the annuities.

Pet. App. 16a. The district court also rejected the notion that petitioners' claims were not "in connection with the purchase or sales of covered securities," even though petitioners had conceded the point in light of *Dabit*.

On appeal, the Fourth Circuit offered no new analysis. It, too, recognized that petitioners "amended their complaints to assert a single claim: that Defendants negligently exposed their investments to the dilution effect of market timing." Pet. App. 5a. Nevertheless, after quoting the above paragraph from the district court's opinion, the Fourth Circuit wrote:

> Having reviewed the record and the applicable law, and having had the benefit of oral argument, we conclude that Plaintiffs' claims are preempted by SLUSA. Accordingly, we affirm based substantially on the reasoning of the district court. *See In re Mut. Funds Inv. Litigation*, 437 F.Supp.2d 439 (D. Md. 2006).

Pet. App. 7a.

REASONS FOR GRANTING THE PETITION

THE FOURTH CIRCUIT'S DECISION FURTHER DIVIDES THE FEDERAL COURTS ON THE PROPER APPLICATION OF THE SECURITIES LITIGATION UNIFORM STANDARDS ACT

A. Federal Courts Are Divided or Otherwise In Disarray With Respect to When a Private Party Has Alleged Misrepresentations, Omissions or Deceptive Devices or Contrivances Within the Meaning of SLUSA

The courts of appeals are deeply divided over the legal test for determining whether a plaintiff has alleged a misrepresentation, omission, deceptive device or contrivance or manipulation within the meaning of SLUSA. Circuit decisions run the gamut from those holding that "extraneous" allegations of misrepresentations in a state law class action complaint do not necessarily run afoul of SLUSA's prohibition, to those on the opposite extreme holding that a complaint devoid of such allegations by a plaintiff who unequivocally disavows any deception-based theory may nevertheless still run aground of the SLUSA prohibition if the plaintiff "could have" alleged a securities fraud claim.

As one district judge lamented, while "it is now clear that courts must probe the plaintiff's pleading to determine whether SLUSA preemption applies ...[,] the question remains as to how broad a brush a court should wield in rewriting a complaint," and appellate authorities "offer[] no guidance in this regard." *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 265-266 (S.D.N.Y. 2004).

1. The Third Circuit's "factual predicate" test

In *LaSala v. Bordier et Cie*, 519 F.3d 121 (3d Cir. 2008), the Third Circuit applied a "factual predicate" approach – determining whether an allegation of misrepresentation "gives rise to liability" – in deciding whether the allegations of a complaint trigger SLUSA's bar. *Id.* at 141. In that case, the plaintiffs (trustees of a bankrupt corporation's liquidating trust) sued two private Swiss banks for aiding and abetting a breach of fiduciary duty by directors of the bankrupt corporation and for violating Swiss money-laundering laws. *Id.* at 127. The complaint alleged the directors "artificially inflated [the corporation's] stock price by representing that its financial position was far stronger than it really was" and then "dumped" their shares at the inflated price through insider trading, all "with the assistance and knowledge of the two Swiss banks. *Id.* at 126. In the money-laundering counts, the plaintiffs "'reallege[d] and incorporate[d] by reference herein in their entirety the allegations' supporting the state-law claims," including the state law claims and allegations of misrepresentation. *Id.* at 141. The banks argued and the district court held that SLUSA preempted the state law aiding and abetting breach of fiduciary duty counts, and that the incorporation of those preempted counts likewise required the dismissal of the money-laundering counts. *Id.* at 129, 140-141.

The Third Circuit reversed, holding that the allegations of misrepresentation were "extraneous" to the money-laundering counts which were not based upon any complicity by the banks in the director's deceitful conduct, but were instead based only on the banks' failure "to investigate and freeze the Directors' various money-laundering transactions." *Id.* at 141. Relying on

its earlier decision in *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 299-300 (3d Cir. 2005), the court held:

> a claim alleges "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security,"15 U.S.C. § 78bb(f)(1)(A), which subjects it to SLUSA preemption, when an allegation of a misrepresentation in connection with a securities trade is a "factual predicate" of the claim, even if misrepresentation is not a legal element of the claim.

LaSala, 519 F.3d at 141 (quoting *Rowinski*, 398 F.3d at 300). "To be a factual predicate, the fact of a misrepresentation must be one that gives rise to liability, not merely an extraneous detail." *Id.* Moreover, the court held that steering clear of explicit allegations of misrepresentation would not "necessarily avoid" SLUSA's reach. *Id.* "Rather, the point we made in *Rowinski* was that when an allegation of misrepresentation in connection with a securities trade, implicit or explicit, operates as a factual predicate to a legal claim, that ingredient is met." *Id.*

The court concluded that the plaintiffs' earlier allegations of misrepresentation, although necessary to the aiding and abetting of breach of fiduciary duty counts, were "extraneous" to the money laundering claims because "they have no bearing on whether the Banks' conduct is actionable; rather, they are merely background details that need not have been alleged, and need not be proved." *Id.* at 141. Thus, under the Third Circuit's approach, even an explicit allegation of misrepresentation did not trigger SLUSA's bar

Relatedly, federal district courts have applied variations of the "factual predicate" test, in recog-

nition of their responsibility to "probe the plaintiff's pleading to determine whether SLUSA preemption applies." *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 265 (S.D.N.Y. 2004). For example, in *Xpedior*, the court applied what it "call[ed] the 'necessary component' test, wherein a court must determine whether the state law claim relies on misstatements or omissions as a 'necessary component' of the claim." *Id.* at 266.

"[U]nder the necessary component test, a complaint is preempted under SLUSA only when it asserts (1) an explicit claim of fraud (e.g., common law fraud or fraudulent inducement), or (2) other garden-variety state law claims that 'sound in fraud.'" *Id.* "Regardless of the words used by plaintiffs in their complaints and regardless of the labels they paste on each claim, the question is whether a material misstatement or omission in connection with the purchase or sale of a covered security is a *necessary component* of the claim." *Id.* at 268 (emphasis in original). "Simply because the operative facts of a complaint *can* give rise to a claim of fraud does not mean that the complaint *must* be read as alleging fraud. To the contrary, a plaintiff is ordinarily free to choose the legal theories upon which she relies and to discard others." *Id.* at 268 (emphasis in original).

The court concluded that the plaintiff's claims (breach of contract, breach of the implied covenants of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment) did not "require misrepresentations or omissions as a necessary element" and did not "sound in fraud." *Id.* at 269. "A claim sounds in fraud when, although not an essential element of the claim, the plaintiff alleges fraud as an integral part of the conduct giving rise to the claim." *Id.*

2. The Seventh Circuit's approach bars state law class actions that *could* have been brought as a federal securities fraud claim

In *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005), *vacated on jurisdictional grounds* 547 U.S. 633 (2006), the Seventh Circuit addressed market timing allegations virtually identical to those involved in the present cases. The primary question in *Kircher* was whether SLUSA barred the state law claims of holders (as opposed to purchasers) of securities, a question the court resolved in the affirmative, *id.* at 484, as did this Court a year later.[9] The Seventh Circuit also concluded the plaintiffs' claims necessarily involved "deceit or manipulation," partly because the court believed a claim of negligence (or "mismanagement," the court's preferred term) by the mutual fund managers "would need to be cast as a derivative action," *id.* at 483, but mostly because the plaintiffs "could have" cast them as fraud claims. *Id.* at 484.

In contrast to the Third Circuit's meticulous paragraph-by-paragraph analysis of the actual allegations of the complaint in *LaSala*, *see, e.g.*, 519 F.3d at 130-131, the Seventh Circuit relied instead on hypothetical allegations:

> Suppose the funds stated in their prospectuses that they took actions to prevent arbitrageurs from exploiting the fact that each fund's net asset value is calculated only once a day. That statement, if false (and known to be so), could support [an SEC] enforcement action, for the deceit would have occurred in connection with investors' purchases of the

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[9] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006).

> funds' securities. Similarly, if these funds had stated bluntly in their prospectuses (or otherwise disclosed to investors) that daily valuation left no-load funds exposed to short-swing trading strategies, that revelation would have squelched litigation of this kind.
>
> *These observations show that plaintiffs' claims depend on statements made or omitted* in connection with their own purchases of the funds' securities. They could have brought them directly under Rule 10b-5 in federal court (to the extent that the purchases occurred within the period of limitations). Indeed, most of the approximately 200 suits filed against mutual funds in the last two years alleging that the home-exchange-valuation rule can be exploited by arbitrageurs have been filed in federal court under Rule 10b-5.

Kircher, 403 F.3d at 484 (emphasis added). Thus, even if a plaintiff does not explicitly allege misrepresentations or omissions and even if misrepresentation or omissions are not a "factual predicate" or "necessary component" of a plaintiff's claims, under the Seventh Circuit's approach in *Kircher*, SLUSA still bars the claims simply because the operative facts of the complaint could be recast to support claims of misrepresentation or omission.

3. The Fourth and Eighth Circuit approach

The Fourth Circuit's framework is similar to the Eighth Circuit's approach in *Dudek v. Prudential Sec., Inc.*, 295 F.3d 875 (8th Cir. 2002). In *Dudek*, the Eighth Circuit concluded that the "substance" or "essence" of the complaint consisted of allegations of misrepresentation, omission or deceptive device or contrivance, despite the absence of ex-

plicit allegations to that effect and despite the plaintiff's explicit repudiation of any deception-based (or omission-based) theory. *Id.* at 879-880. The court did not quote from the complaint or explain how the allegations necessarily amounted to allegations of misrepresentation, omission or deception as opposed to other, non-fraudulent but actionable conduct.

The plaintiffs in *Dudek* initially filed an action in New York state court "asserting nine causes of action, including fraud and deceit, breach of fiduciary duty, deceptive business practices in violation of the New York General Business Law, negligent misrepresentation, and unjust enrichment." *Id.* at 879. The complaint explicitly alleged that defendants "affirmatively mislead prospective customers" about the suitability of investments, "fail[ed] to disclose the inappropriateness and unsuitability of such investments," and that these "practices constitute deceptive and abusive practices." *Id.* After the case was removed to federal court, the plaintiffs voluntarily dismissed and later refiled in Iowa state court, and the defendants again removed the case to federal court. *Id.*

In their Iowa complaint, the "plaintiffs deleted the allegations of fraud, misrepresentation and non-disclosure that permeated their New York complaint" and asserted five causes of action: "breach of fiduciary duty by selling 'inherently unsuitable and inappropriate' tax-deferred annuities, unjust enrichment, declaratory and injunctive relief, reformation, and conspiracy to breach fiduciary duties." *Id.* The district court nonetheless concluded that "plaintiffs' claims were in substance based upon material misrepresentations and non-disclosures" and dismissed the complaint. *Id.* at 878.

On appeal, the plaintiffs "argue[d] their claims [were] based on excessive fee charges," but the Eighth Circuit rejected that characterization: "the claim is that defendants' *misconduct* caused plaintiffs to invest in appropriate securities." *Id.* (emphasis added). *Dudek* seems to suggest that any "misconduct" that causes a plaintiff "to invest" is by definition a SLUSA-triggering allegation of misrepresentation, omission or deceptive device or contrivance. The opinion hints at another possible reading of the plaintiffs' allegations: that the defendants' mere act of "*selling* 'inherently unsuitable and inappropriate' tax-deferred annuities" was itself a breach of fiduciary duty (or an unjust enrichment) in the absence of a misrepresentation by the defendants or even if the defendants had disclosed the unsuitability of the investment; in other words, the defendants simply could not have, consistent with their fiduciary obligations, sold such investments to the plaintiffs with or without full disclosure.

Had *Dudek* applied the Third Circuit's "factual predicate" test (or a "necessary component" test), the outcome might have been different. The court would have at least needed to foreclose the possibility that plaintiffs were alleging – as the opinion suggests itself they may have been – that the mere act of selling the unsuitable investments alone constituted a breach of fiduciary duty or unjust enrichment.[10] The court acknowledged that the

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[10] Whether such an allegation would have stated a viable breach of fiduciary claim as a matter of state law would, of course, have been a separate question. As the *Xpedior* court recognized, however, just because a claim may not survive as a matter of state law does not mean the plaintiff "must be *really* asserting fraud claim. ... [T]his argument misses the point. If Xpedior's Complaint fails to state a claim, I need not reach the SLUSA issue; the Complaint would be dis-

"plaintiffs deleted the allegations of fraud, misrepresentation, and non-disclosure," and that "the overall target of both complaints is what plaintiffs call defendants' 'general business plan to sell tax-deferred annuities for investment by persons owning qualified retirement plans." *Id.* at 879-880.

The Eighth Circuit did not, however, quote any allegations from the Iowa complaint which led the court to conclude that "the essence" and "substance" of the allegations were misrepresentation, failure to disclose and deceptive device and contrivance. Although the Eighth Circuit did not postulate hypothetical allegations the plaintiffs "could have" made like the Seventh Circuit did in *Kircher*, the *Dudek* court does appear to have permitted the *abandoned* allegations of the first complaint to influence, if not actually control, the reading of the second complaint.

Without an exegesis of the plaintiffs' actual allegations it is impossible to determine whether the Eighth Circuit correctly decided *Dudek*. The reader is left with only the court's unexplained inference that the "substance" and "essence" of the unquoted complaint amounted to "artfully concealed" allegations of misrepresentation or omission. *Id.* at 879, 880.

B. By Holding That A Common Law Negligence Claim Triggers SLUSA's Bar, The Fourth Circuit Misinterpreted This Court's Precedents, Reaching An Outcome Inconsistent With The Statutory Text And Purpose

SLUSA's scope is clear and unambiguous. It bars state-law class actions "alleging":

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missed under Rule 12(b)(6)." *Xpedior*, 341 F.Supp.2d at 269 n.60.

> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b); *accord id.* § 78bb(f)(1). As this Court succinctly put it, SLUSA precludes "private state-law 'covered' class actions alleging untruth or manipulation in connection with the purchase or sale of a 'covered' security ...." *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636-637 (2006).

There is of course only one way for a court to determine whether a party has "alleged" something: consult that party's pleadings. Tellingly, neither the district court nor the Fourth Circuit made any attempt to marshal any of petitioners' complaint allegations in support of their conclusions that petitioners have alleged misrepresentations or omissions. Petitioners alleged that respondents' "mismanagement exposes investors to market timing," and that respondents were negligent for:

> i. failing to evaluate on a daily basis price relevant information after the close of foreign securities markets
>
> ii. failing to adjust calculation of daily [unit values] to take into account any changes in value of the foreign securities
>
> iii. failing to implement policies and procedures which would protect sub-account holders from market timing.

Pet. App. 48a, 58a-59a (¶ 67).

Adopting the district court's reasoning, the Fourth Circuit concluded that petitioners had effectively alleged a misrepresentation or omission of a material fact because their allegations "'concern[ed] the value of the securities sold ....'" Pet. App. 6a. The court did not cite, quote or even discuss the substance of any of the actual allegations. Rather, the court described the claims as being based upon "incorrectly priced ... investment options provided under the annuities," *id.*, which the court simplistically equated with a *misrepresented price* of a security of the sort typical in cases where an investor claims he was fraudulently induced to purchase a security at an artificially inflated price.

That reasoning, however, is demonstrably wrong, and it ignores the realities of how mutual funds and variable annuities work: it is metaphysically impossible for anyone ever to buy a mutual fund share or a variable annuity accumulation unit at a "misrepresented price" because investors are always required to place their buy and sell orders *before* the mutual fund share price (or variable annuity unit value) at which those trades will be executed *is ever calculated.* In other words, at the time trade orders for mutual funds (or accumulation units) are placed, the mutual funds (or accumulation units) and respondents have not "represented" anything to anyone, much less have they "misrepresented" the price of the fund's shares (or accumulation unit values).

All orders to buy or sell mutual fund shares (or accumulation units) must be placed *before* 4:00 p.m. Eastern Time. Before 4:00 p.m. Eastern Time, no price has yet been calculated. At the time mutual fund share orders are placed before 4:00 p.m. Eastern Time, an investor (including market timers) can only make educated guesses

about the price which will be calculated *after* 4:00 p.m. It is therefore impossible for anyone who is buying mutual funds or annuity units to know what the share price will be. Only after 4:00 p.m. and after trade orders have already been executed can the newly calculated price ever "represented" to anyone. Only after existing investors have already been injured by the execution of the trade orders is the price of the mutual fund share (or unit value) made public for the very first time. Thus, even if the negligently calculated price could somehow be deemed to be a "misrepresentation," that is still not what this case is about. Petitioners make no complaint about any falsity of respondents' "representations" of price because the conduct of which petitioners complain injured them before respondents ever made any "representation" to anyone. *See Paru v. Mutual of Am. Life Ins. Co.*, No. 04 Civ. 6907(JES), 2006 WL 1292828 at *5 (S.D.N.Y. May 11, 2006) (holding that that market timing complaint with allegations very similar to those here did "not contain a single allegation of a misrepresentation or omission of a material fact made by defendant which could trigger SLUSA preemption").

C. This Case Presents An Excellent Vehicle To Resolve The Issue Presented

The timing of this petition is fortuitous because the *Kircher* case, now back in state court on remand from the federal courts, is pending before the Illinois Appellate Court in an interlocutory appeal on the very issue presented in this petition. After *Kircher* returned to state court, the trial judge denied the Putnam defendants motions for judgment on the pleadings, concluding that the *Kircher* plaintiffs had not alleged any misrepresentations or omissions in their complaint. Pet. App. 106a-109a. That court certified its ruling for in-

terlocutory appeal, and the Illinois Appellate Court granted the Putnam defendants' petition for leave to appeal. Pet. App. 110a-112a, 113a-114a. The case is fully briefed and awaiting an oral argument setting.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 30, 2009

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 06-1788, 06-1789, 06-1790, 06-2010

In Re: MUTUAL FUNDS
INVESTMENT LITIGATION

In Re: ALGER, COLUMBIA, JANUS, MFS,
ONE GROUP, PUTNAM, and ALLIANZ
DRESDNER

MATTHEW WIGGENHORN, individually and
on behalf of all others similarly situated,
Plaintiff – Appellant,

v.

AXA EQUITABLE LIFE INSURANCE
COMPANY, formerly known as Equitable Life
Assurance Society of the United States,
Defendant –Appellee.

EDMUND WOODBURY, individually and on
behalf of all others similarly situated,
Plaintiff – Appellant,

v.

NATIONWIDE LIFE INSURANCE
COMPANY,
Defendant –Appellee.

NIKITA MEHTA, as Trustee of the N.D.
Mehta Living Trust, individually and on
behalf of all others similarly situated,
Plaintiff – Appellant,

v.

AIG SUNAMERICA LIFE ASSURANCE COMPANY, formerly known as Anchor National Life Assurance Company,
Defendant –Appellee.

PAULA BEALS,
Plaintiff – Appellant,

v.

THE VARIABLE ANNUITY LIFE INSURANCE COMPANY,
Defendant –Appellee.

[Argued: October 31, 2008]
[Decided: January 30, 2009]

Appeals from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (1:04-md-15863-JFM)

Before MICHAEL, SHEDD, and DUNCAN, Circuit Judges.

PER CURIAM:

Matthew Wiggenhorn, Edmund Woodbury, Nikita Mehta, and Paula Beals (collectively "Plaintiffs") appeal the district court's dismissal of their respective class action suits against AXA Equitable Life Insurance Co., Nationwide Life Insurance Co., AIG SunAmerica Life Assurance Co., and Variable Annuity Life Insurance Co. (collectively "Defendants"). The district court dismissed the cases based on its determination that the suits are

preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). Finding no error, we affirm.

I.

Plaintiffs purchased variable annuities from Defendants. Although variable annuities offer a range of investment options, those at issue here involved mutual funds containing foreign securities.

Policyholders of variable annuities allocate money among the various investment accounts offered by the annuity. If policyholders choose to invest in variable accounts, they further apportion their money into sub-accounts that each correspond with a mutual fund invested in by Defendants. The money that policyholders invest in a particular sub-account goes into a pool of assets, owned by Defendants, which is used to purchase shares of the designated mutual fund. Rather than own the mutual fund shares themselves, policyholders receive sub-account Accumulation Units ("AUs") in proportion to the amount of money they have invested in the sub-account.

The value of a sub-account's AU is determined once every business day at the close of trading on the New York Stock Exchange ("NYSE"), 4:00 p.m. Eastern Time. The value is based on the corresponding mutual fund's net asset value ("NAV"), which is also determined at the close of the NYSE. To determine the NAV of a mutual fund, Defendants use the closing trade price of each security in its home market; as a result, the closing prices of foreign securities whose markets close earlier than 4:00 p.m. Eastern Time are several

hours old by the time the mutual fund's NAV is calculated.

Further, value movements on the NYSE which occur after the close of foreign securities markets often foreshadow a corresponding movement in those markets the following day. Resourceful short-traders can take advantage of these "stale" foreign securities prices by buying or selling shares of a mutual fund's corresponding sub-account, depending on whether the securities are undervalued or overvalued, and then quickly selling or buying those shares once the foreign market reflects the most recent value movement. This practice is called "market timing." When annuity holders "market time," it dilutes the ownership interests of other sub-account holders.

II.

Plaintiffs brought these putative class actions on behalf of all variable annuity policyholders who (a) invested in sub-accounts corresponding with mutual funds containing foreign securities and (b) did not engage in market timing. The four actions were filed in Illinois state court and were based on state law. Initially, Plaintiffs claimed that Defendants negligently relied on the stale NAVs to calculate the value of the sub-account shares and that Defendants deceived policyholders, or at least failed to provide them with complete and truthful information, by not informing them of the potential harm of market timing.

Defendants removed each of the four cases to the United States District Court for the Southern District of Illinois and moved to dismiss them on the basis that the claims were preempted by SLUSA.

Plaintiffs moved to remand the cases for lack of subject matter jurisdiction, arguing in part that SLUSA did not apply because Plaintiffs were all non-trading securities holders.[1] Before the district court ruled on these motions, the Judicial Panel for Multidistrict Litigation transferred the actions to the United States District Court for the District of Maryland, where they were consolidated with an existing multidistrict proceeding involving other market timing cases. Defendants renewed their motions to dismiss based on SLUSA preemption.

In an effort to avoid SLUSA preemption, Plaintiffs amended their complaints to assert a single claim: that Defendants negligently exposed their investments to the dilution effect of market timing. Nevertheless, the district court granted Defendants' motions to dismiss on SLUSA preemption grounds. Specifically, the district court found that Plaintiffs' claims were preempted by 15 U.S.C. § 78bb(f)(1)(A), which states:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security[.]

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[1] This argument has since been foreclosed by Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006), which held that SLUSA precludes the state law claims of non-trading securities holders, just as it does the state law claims of securities purchasers and sellers.

The district court held that Plaintiffs' allegations involved a "misrepresentation or omission," reasoning:

> The element of a misrepresentation or omission of a material fact is satisfied when a plaintiff alleges a misrepresentation concerning the value of the securities sold or the consideration received in return. That is exactly what the plaintiffs have done here, despite their emphatic disavowal of their prior explicit allegations of misrepresentation, and their pared-down amended complaint. Putting aside the convoluted terminology and formulas associated with variable annuities, at bottom the plaintiffs simply allege that the defendants incorrectly priced certain investment options provided under the annuities.

In re Mut. Funds Inv. Litigation, 437 F.Supp.2d 439, 443 (D.Md. 2006)(citations and punctuation omitted).

The district court also found that Defendants' alleged misrepresentations occurred "in connection with" the purchase or sale of securities. Plaintiffs argued that because they did not trade the securities themselves, but were merely non-trading holders of the securities, Defendants' misrepresentations to Plaintiffs could not have occurred "in connection with" the purchase or sale of securities. Rejecting this argument, the district court noted that in Merrill Lynch the Supreme Court held that SLUSA applies broadly and preempts claims brought by

holders of securities, as well as by purchasers and sellers. Merrill Lynch, 547 U.S. at 88-89. For the above reasons, the district court granted Defendants' motions to dismiss.

III.

We review de novo the dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6). Constantine v. Rectors and Visitors of George Mason Univ., 411 F.3d 474, 498 (4th Cir. 2005). We accept as true "all well-pleaded allegations and . . . view the complaint in a light most favorable to the plaintiff." Id. (citations omitted). Further, dismissal is not appropriate "unless it appears certain that the plaintiff can prove no set of facts which would support her claim and would entitle her to relief." Id. (punctuation omitted). Questions of subject matter jurisdiction are also reviewed de novo. Lontz v. Tharp, 413 F.3d 435, 439 (4th Cir. 2005).

Having reviewed the record and the applicable law, and having had the benefit of oral argument, we conclude that Plaintiffs' claims are preempted by SLUSA. Accordingly, we affirm based substantially on the reasoning of the district court. See In re Mut. Funds Inv. Litigation, 437 F.Supp.2d 439 (D.Md. 2006).[2]

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[2] In light of our disposition, we need not address the parties' arguments regarding alternative grounds for dismissal. Additionally, given our conclusions regarding the motions to dismiss, we find that the district court did not err in failing to remand the case to state court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Nos. 04-MD-15863, JFM-04-3943, JFM-05-1674,
JFM-04-3944

IN RE MUTUAL FUNDS INVESTMENT
LITIGATION

NIKITA MEHTA
v.
AIG SUNAMERICA LIFE ASSURANCE CO.

WIGGENHORN
v.
AXA EQUITABLE LIFE INSURANCE CO.

WOODBURY
v.
NATIONWIDE LIFE INSURANCE CO.

[June 1, 2006]

MEMORANDUM

The plaintiffs in these actions purchased variable annuities from the defendant insurance companies that included mutual funds as investment options. Certain of these funds, in which the plaintiffs invested, contained foreign securities. They

now seek compensation for the alleged dilutive damage their holdings suffered as a result of market timers that exploited the funds' "stale" prices.[3] However, in apparent contrast to the core allegation of the class investor and derivative actions that market timing was concealed from everyday investors, see *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d at 872, plaintiffs do not make any explicit allegations of misrepresentation, fraud, or deceit, which would have facially brought their complaints within the ambit of Rule 10b-5. Rather, in an effort to avoid the preemptive scope of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 1 12 Stat. 3227, they allege only that the defendants negligently breached state common law duties by incorporating the stale mutual fund prices into the value of the variable annuity accounts.

Now pending before me are the defendants' motions to dismiss the amended complaints. Because the facts and legal arguments presented by each of these three actions are materially indistinguishable,

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[3] Because most mutual funds calculate their net asset value per share ("NAV") only once per day-at the close of the New York Stock Exchange-there is a potential that the NAV will become "stale" because it does not incorporate the most recent market information. Roberto M. Braceras, *Late Trading and Market Timing*, 37 Rev. Sec. & Commodities Reg. 61, 64 (April 14, 2004). "This is most common in mutual funds that invest in international securities, where the markets close many hours before the U.S. market. For example, if U.S. stocks rally after the international markets have closed for the day, the value of the international securities on that day will not reflect the rise in the U.S. market." *Id.*; *see also In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845, 851 n.1 (D. Md. 2005).

there is no need to write separate opinions. For the reasons stated below, I will grant the motions.

I.

A variable annuity is an insurance product designed to protect the policyholder from outliving her retirement nest egg. See U.S. Securities and Exchange Commission, *Variable Annuities: What You Should Know*, *at* http://www.sec.gov/investor/pubs/ varannty.htm. To that end, a variable annuity offers a range of investment options, the most common being mutual funds,[4] and are characterized by three distinctive features: earnings are tax-deferred; the purchaser can receive periodic payments from the insurance company for up to as long as the rest of her life; and a death benefit is paid out to a designated beneficiary upon the purchaser's death. *Id.*

There are generally two phases to investing in a variable annuity. During the "accumulation phase," policyholders allocate their principal and subsequent gains between a fixed account and a variable account. *Id.* The former is equivalent to a money market account in that it simply pays a fixed amount of interest, while the latter is divided into sub-accounts that correspond to the various investment options available under the plan. *Id.* So, for example, during this phase a policyholder could invest $10,000

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[4] The insurance companies that sell variable annuities do not manage the underlying mutual funds themselves, but instead contract with various fund managers to handle this responsibility. None of the managers that the defendant insurance companies contracted with has been named as a defendant in these actions.

in an annuity, allocating $4,000 to the fixed account and $6,000 to the variable account, dividing the latter equally between three subaccounts: a large-cap U.S. stock fund, a U.S. government bond fund, and a small-cap international stock fund. Once the "payout phase" begins, the policyholder receives from the insurance company the principal she invested plus or minus any investment returns. She can choose to receive this money as either a lump-sum payment or a stream of periodic payments stretched over a set time period.[5] *Id.*

The money policyholders allocate to a particular sub-account becomes the property of the insurance company and forms a pool of assets with which the company then purchases shares of the designated mutual fund. Policyholders do not, therefore, own the fund shares themselves. Instead, they own Accumulation Units ("AU") in the sub-account. At issue in these actions is the method by which the defendant insurance companies value an AU.[6]

The initial value of an AU is set when the sub-account is created and the insurance company

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[5] If periodic payments commence upon the purchase of the annuity, there are no separate phases and the annuity is referred to as an "immediate annuity." U.S. Securities and Exchange Commission, Variable Annuities: What You Should Know.

[6] For the following description of how sub-accounts are valued, I employ the terminology used by Nationwide. (Nationwide Policy, Exhibit A to Nationwide Br.) The underlying methodology, however, is consistent among the defendants.

purchases the first shares of the mutual fund. Defendant Nationwide, for example, arbitrarily set the value of all AUs at $10. (Nationwide Policy at 6). Thereafter, the value of an AU in a particular sub-account is calculated by multiplying the value of the AU from the prior Valuation Period by the Net Investment Factor for the subsequent Valuation Period. (*See e.g., id.*). A Valuation Period is the interval between closings of the New York Stock Exchange ("NYSE") on days that it is open for trading, e.g., 4pm EST on Friday until 4pm EST on the next Monday. (See *e.g.*, id.). Closings of the NYSE mark the beginning and end of these intervals because it is at that time that most mutual funds calculate their NAV. See *supra* note 1. As for the Net Investment Factor, it is generally determined by dividing (1) by (2) and then subtracting (3) from the result, where (1) is the NAV of the mutual fund held in the sub-account during the current Valuation Period; (2) is the fund's NAV during the prior Valuation Period; and (3) is a percentage factor representing the policy's mortality risk premium and expense risk charge.[7] (See e.g., Nationwide Policy at 6).

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[7] To illustrate in numbers how this calculation works, assume an initial AU value of $50 within a particular subaccount, to which a policyholder allocates $1,000 during Valuation Period 1. This investment entitles the policyholder to 20 AUs. Assume further that the NAV of the underlying mutual fund is $40 during Valuation Period 1, and that at the subsequent close of the NYSE, the beginning of Valuation Period 2, the NAV is recalculated at $48, a 20% increase over the prior period. If the combined charge for the mortality risk premium and expense risk charge is 5%, then the Net Investment Factor for Valuation Period 2 would be 15%. The value of an AU would therefore

Thus, if a mutual fund that contains foreign securities has a stale NAV, the value of the corresponding sub-account's AUs will be affected through the Net Investment Factor. For any purchases or redemptions of fund shares at a stale price will skew the NAV growth rate between Valuation Periods. The impact of such trades on policyholders invested in the sub-account is not always negative, however. To be sure, the value of their AUs is diluted when purchases are made when the underlying fund is undervalued, or when redemptions occur when the fund is overvalued. But their investment is artificially *inflated* when overvalued shares are purchased or undervalued shares are redeemed.

II.

These putative class actions initially were brought on behalf of all variable annuity policyholders who invested in sub-accounts that had mutual funds containing foreign securities, and who did not engage in market timing. The complaints were all filed in Illinois state court and pled various state law causes of action. Those claims, however, can be boiled down into two broad categories. First, the defendants acted negligently and/or recklessly by relying upon stale NAVs in calculating the value of policyholders' sub-account investments. Second, the defendants deceived policyholders by not informing

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increase by that percentage to $57.50, meaning that the policyholder's 20 AUs would be worth $1,150 in Valuation Period 2.

them of the potential for market timing and the harm it entails.

The defendants removed each of these actions to the U.S. District Court for the Southern District of Illinois and moved to dismiss them on the basis that the claims were preempted by SLUSA. Before the court ruled upon the motions, the Judicial Panel for Multidistrict Litigation transferred the actions to this court.

In an effort to buttress their argument against SLUSA preemption, the plaintiffs filed amended complaints, either immediately before the transfer or shortly thereafter, that eliminate any explicit mention of misrepresentation and deception, and that plead only one cause of action: common law negligence. Specifically, the complaints allege that the defendants acted negligently by failing to (1) evaluate "price relevant information" after the close of the foreign securities markets and adjusting the value of sub-account AUs accordingly, and (2) implement policies and procedures to protect policyholders from the dilutive effect of stale price trading. In response to the amended complaints, the defendants have again moved to dismiss.[8]

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[8] In addition to arguing that SLUSA preempts the plaintiffs' negligence claims, the defendants argue that the plaintiffs lack standing and that the claims are also preempted by the Investment Company Act of 1940, 15 U.S.C. § § 80a-1, et seq., and the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416. I express no opinion as to these issues.

III.

As amended by SLUSA, the Securities Exchange Act of 1934 states:

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 78bb(f)(1).[9] Variable annuities are "covered securities." *Id.* § 78bb(f)(5)(E); see e.g., *Dudek v. Prudential Securities, Inc.*, 295 F.3d 875, 878 (8th Cir. 2002); *Patenaude v. Equitable Life Assurance Soc'y*, 290 F.3d 1020, 1024 (9th Cir. 2002); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 109 (2d Cir. 2001). Further, all of these suits are "covered class actions" because the plaintiffs seek to represent more than 50 investors and each action is direct rather than derivative. 15 U.S.C. § 78bb(f)(5)(B)-(C). At issue, then, is whether the negligence claims satisfy either subparagraph (A) or (B). I conclude that they satisfy the former.

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[9] The 1933 Act contains functionally identical language, see 15 U.S.C. §77p, but for convenience I will cite the relevant provisions of the 1934 Act.

"The element of a misrepresentation or omission of a material fact is satisfied when a plaintiff alleges a misrepresentation concerning the value of the securities sold or the consideration received in return." *Araujo v. John Hancock Life Ins. Co.*, 206 F. Supp. 2d 377, 382 (E.D.N.Y. 2002) (internal quotations and ellipsis omitted). That is exactly what the plaintiffs have done here, despite their emphatic disavowal of their prior explicit allegations of misrepresentation, and their pared-down amended complaint. Putting aside the convoluted terminology and formulas associated with variable annuities, at bottom the plaintiffs simply allege that the defendants incorrectly priced certain investment options provided under the annuities. *See Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698,702 (5th Cir. 2004) ("The issue of preemption thus hinges on the content of the allegations -- not on the label affixed to the cause of action.").[10]

This allegation also satisfies the "in connection with" prong. I stated in the *Janus* investor class opinion that the express language of the prong counsels against a narrow interpretation by which an alleged misrepresentation or omission is "in connection with the purchase or sale of a covered

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[10]The plaintiffs concede as much in their opposition memoranda. (See e.g., Wiggenhorn Opp. Br. at 4 ("Plaintiff has alleged that Equitable negligently calculated the annuity's 'unit values' which it sold to third party market timers. Thus, to the extent that Equitable may be said to have "misrepresented" the annuity's unit values, it was not in connection with Plaintiffs purchases or sales of the annuity units but, instead, was in connection with the market timers' purchases and sales of annuity units.")).

security" only when the plaintiff herself was the purchaser or seller of the security. *See In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d at 855 n.7. In its recent unanimous decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, the Supreme Court agreed:

When this Court *has* sought to give meaning to the phrase in the context of §10(b) and Rule 10b-5, it has espoused a broad interpretation. A narrow construction would not, as a matter of first impression, have been unreasonable; one might have concluded that an alleged fraud is "in connection with" a purchase or sale of securities only when the plaintiff himself was defrauded into purchasing or selling particular securities. After all, that was the interpretation adopted by the panel in the *Birnbaum* case. See 193 F.2d at 464. But this Court, in early cases like *Superintendent of Ins. Of N.Y.* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 92 S. Ct. 165, 30 L. Ed. 2d 128 (1971), and most recently in *SEC v. Zandford*, 535 U.S. 813,820,822, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002), has rejected that view. Under our precedents, it is enough that the fraud alleged "coincide" with a securities transaction --whether by the plaintiff or by someone else. See *O'Hagan*, 521 U.S., at 651, 117 S. Ct. 2199, 138 L. Ed. 2d 724. The requisite showing, in other words, is "deception 'in connection with the purchase or sale of any security,' not deception of an identifiable purchaser or seller." *Id.*, at 658, 117 S. Ct. 2199, 138 L. Ed. 2d 724. Notably, this broader interpretation of the statutory language comports with the longstanding views of the SEC. Sec *Zandford*, 535 U.S., at 819- 820,122 S.

Ct. 1899, 153 L. Ed. 2d 1. 126 S. Ct. 1503, 15 13 (2006) (emphasis in original).

The Court went on to say:

> The holder class action that respondent tried to plead, and that the Second Circuit envisioned, is distinguishable from a typical Rule 10b-5 class action in only one respect: It is brought by holders instead of purchasers or sellers. For purposes of SLUSA pre-emption, that distinction is irrelevant; *the identity of the plaintiffs does not determine whether the complaint alleges fraud 'in connection with the purchase or sale' of securities.*

Id. at 15 15 (emphasis added). Thus, because the alleged harm to the plaintiffs' investments arose from the purchase and sale of sub-account AUs at stale (i.e., misrepresented) prices, under Dabit it does not matter that the plaintiffs were not the ones who engaged in the purchasing and selling.

In sum, the plaintiffs' artful attempt at avoiding SLUSA preemption ultimately fails. The defendants' motions to dismiss are therefore granted. A separate order follows herewith.

/s/_____

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Nos. 04-MD-15863, JFM-04-3943, JFM-05-1674,
JFM-04-3944

IN RE MUTUAL FUNDS INVESTMENT
LITIGATION

NIKITA MEHTA
v.
AIG SUNAMERICA LIFE ASSURANCE CO.

WIGGENHORN
v.
AXA EQUITABLE LIFE INSURANCE CO.

WOODBURY
v.
NATIONWIDE LIFE INSURANCE CO.

[June 1, 2006]

ORDER

For the reasons stated in the accompanying Memorandum, it is hereby Ordered that:

1. Defendants' motions to dismiss are granted; and

2. Judgment is entered in favor of Defendants against Plaintiffs.

/s/

J. Frederick Motz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

No. JFM-05-1086

CHAMBERS OF
J. FREDERICK MOTZ

UNITED STATES DISTRICT JUDGE
101 WEST LOMBARD STREET
BALTIMORE, MARYLAND 21201

[August 21, 2006]

Memo to Counsel Re: MDL- 15863, Variable Annuity Actions *Beals v.* The *Variable Annuity Life Ins. Co.,*

Dear Counsel:

I have reviewed the memoranda submitted in connection with defendant's motion to dismiss. Both parties concede that plaintiffs complaint is materially indistinguishable from the three complaints I found to be preempted by SLUSA in *In re Mutual Funds Inv. Litig.*, 2006 *WL* 1888929 (D. Md. June 1,2006). Accordingly, defendant's motion is granted,

Despite the informal nature of this letter, it should be flagged as an opinion and docketed as an order. An order implementing this ruling is attached.

Very truly yours,

/s/

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Nos. MDL-1686, JFM 1086

IN RE MUTUAL FUNDS
INVESTMENT LITIGATION

PAULA BEALS
v.
VARIABLE ANNUITY LIFE
INSURANCE CO.

[Aug. 21, 2006]

ORDER

For the reasons stated in the accompanying memorandum, it is, this 21st day of August

ORDERED that

1) Because the parties agree that Plaintiff's complaint is materially indistinguishable from the three complaints found to be preempted by SLUSA in *In re Mutual Funds Inv. Litig.*, 2006 WL 1888929 (D. Md. June 1, 2006), Defendant Variable Annuity Life Insurance Co.'s motion to dismiss is granted for the reasons stated in that opinion; and

2) This case is closed.

/s/
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Cause No. 04-CV-3944

EDMUND WOODBURY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILAR SITUATED,
Plaintiff,

v.

NATIONWIDE LIFE INSURANCE COMPANY,
Defendant.

[Filed May 13, 2005]

FIRST AMENDED COMPLAINT

* * * * *

NATIONWIDE'S VARIABLE ANNUITY FUNDS

6. People invest in variable annuities for the same reasons people invest in mutual funds: their investment is pooled with those of thousands of other investors thereby achieving economies of scale that investors could not otherwise enjoy individually. For instance, investors can be collectively invested in a far more richly diversified portfolio of securities than they would be able to invest in individually; collectively they enjoy the benefits of professional

management of their funds (such as investment research and daily monitoring of markets and securities) for a miniscule fraction of the cost they would pay individually because the costs are spread among thousands of investors; and, because large blocks of securities are traded on behalf of thousands of investors, trading transactional costs are vastly reduced because the transactional costs for the single "collective investor" are also spread among the thousands of actual investors invested in the fund. In addition, investors in variable annuities enjoy tax deferment on their investment, as well as a death benefit.

7. The Nationwide annuities which are the subject of this First Amended Complaint consist of a "Separate Account" in which NATIONWIDE keeps investors' assets separate from NATIONWIDE'S own assets.

8. Investors' funds in the separate account are the property of the investors and not the property of NATIONWIDE.

9. Each annuity's separate account is further divided into multiple sub-accounts, each of which corresponds to a single mutual fund.

10. Investors' funds in the sub-accounts are the property of the investors and not the property of NATIONWIDE.

11. NATIONWIDE invests the investors' funds in each sub-account in that sub-account's corresponding mutual fund. These mutual funds are maintained exclusively for variable annuity or variable life insurance products, although they often

bear names very similar to those of retail mutual funds.

12. Because the funds in the sub-accounts are investors' funds, when NATIONWIDE invests those funds in a mutual fund, the investors are the real owners of the shares of the mutual fund which NATIONWIDE only nominally holds in its name on behalf of and for the benefit of the investors.

13. NATIONWIDE credits each investor with "units" of the sub-accounts in which the investor's funds are invested.

14. There is no limit to the number of sub-account units which NATIONWIDE can issue to investors who are willing to invest in the sub-accounts. Thus, NATIONWIDE is indifferent to the number of subaccount units it issues and has no interest in the relative percentage of an investor's ownership interest in a sub-account.

15. Units in NATIONWIDE sub-accounts can be traded, either by purchase or redemption, only once per day at 4:00 p.m. Eastern Time.

16. NATIONWIDE establishes a new daily "accumulation unit value" (AUV) for each sub-account once every trading day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time.

17. At the end of each trading day, NATIONWIDE (either directly or through a fund manager) valuates the assets in each mutual fund and establishes a "net asset value" for each mutual fund. That net asset value is the same net asset

value NATIONWIDE uses to establish the corresponding sub-account's daily AUV.

18. The two factors which have the largest influence on the AUV are the value of the mutual fund portfolio and the total number of investors invested in that mutual fund (i.e., the total number of investors who hold units in the sub-account which corresponds to any given mutual fund).

19. Because the sub-accounts' AUVs are based upon the per share value of the underlying mutual fund, the value of an investor's sub-account units will fluctuate as the value of the corresponding mutual fund fluctuates.

20. NATIONWIDE contracts with fund managers who manage the mutual funds in which NATIONWIDE invests sub-account funds.

21. The fund managers handle the day-to-day tasks associated with managing an investment portfolio, such as investment management and valuation of the mutual fund's underlying portfolio of securities.

NATIONWIDE SUB-ACCOUNTS' CORRESPONDING MUTUAL FUNDS' PORTFOLIOS INCLUDE FOREIGN SECURITIES

22. Some of the mutual funds in which the annuity sub-accounts are invested include in their portfolios securities which are traded in markets outside of the United States.

23. In valuing the assets of a mutual fund, the fund manager uses the last trade price in the home market of each of the securities in its portfolio.

The home markets for the foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five to fifteen hours ahead of Eastern Time.

24. Thus, a five to fifteen hour interval elapses between the close of the foreign securities markets and NATIONWIDE'S calculation of its sub-accounts' AUVs.

25. For example, the exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. Tokyo time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. Tokyo time (2:00 a.m. Eastern time). When NATIONWIDE calculates the value of the mutual funds' portfolios which include Japanese securities, NATIONWIDE uses the prices at which those Japanese securities' closed on the Tokyo exchange (at 2:00 a.m. Eastern Time), closing prices that have been static for 14 hours.

26. There is a positive correlation between value movements in the U.S. markets and value movements in foreign markets. If the U.S. markets experience an upward movement in values, it can be predicted that foreign markets will move upward once trading begins the next day. Similarly, if the U.S. markets experience a downward movement in values, it can be predicted that foreign markets will move downward once trading begins the next day.

27. The greater the percentage increase or decrease in the value of U.S. markets, the more likely foreign markets will post corresponding value

movements on the subsequent trading day. The probability that the value movements of foreign markets will follow the previous day's value movements in U.S. markets is directly correlated to the degree or extent of the value movement of U.S. markets.

NATIONWIDE'S MISMANAGEMENT EXPOSES INVESTORS TO MARKET TIMING

28. A significant portion of the underlying securities in the mutual fund portfolios associated with the NATIONWIDE'S sub-accounts are listed on foreign exchanges and trade during each market's respective session.

29. When NATIONWIDE or its fund managers establish the share values of the mutual funds in which NATIONWIDE invests the sub-accounts' funds, they do not take into account on a daily basis any price relevant information (such as such as value movements in the U.S. markets, changes in world equity market indices, changes in the value of American Depository Receipts (ADRs), and fluctuations in foreign currency futures markets) that has become available in the interval between the close of the foreign markets and the calculation of the mutual funds' share values.

30. Such price relevant information is significant because the final market prices of the foreign securities often have become stale because they no longer reflect the current market value of the securities.

31. When the foreign securities prices are stale, NATIONWIDE (or its fund managers') use of such stale prices of the foreign securities to calculate

the AUV causes the AUV to be either artificially high or artificially low.

32. NATIONWIDE'S calculation of artificially high or artificially low AUVs exposed existing subaccount holders to market timing traders who regularly purchase and redeem units of NATIONWIDE'S subaccounts as part of a profitable, stale-price trading strategy.

33. Market timing is a short-term trading strategy by which the market timing trader takes advantage of the artificially low or high AUV's. Because NATIONWIDE uses stale pricing of foreign securities to calculate mutual fund share values and thus sub-account AUV's, market timers are able to predict changes in the AUV's based on events that occur after the close of foreign securities markets but before the U.S. markets close.

34. Market timers buy units of NATIONWIDE'S sub-accounts on days when the U.S. markets move up, and they redeem units when the U.S. markets move down.

35. Due to NATIONWIDE'S use of stale pricing, anyone who buys NATIONWIDE'S sub-account units on days when the U.S. markets move up are buying units whose prices are artificially low, irrespective of whether the purchaser intends to market time. Similarly, anyone who redeems NATIONWIDE'S subaccount units on days when the U.S. markets move down are redeeming units whose prices are artificially high, irrespective of whether the purchaser intends to market time.

NATIONWIDE'S FAILURE TO PROHIBIT MARKET TIMING DILUTES HOLDERS' OWNERSHIP INTERESTS

36. Every purchase of NATIONWIDE'S sub-account units at an artificially low AUV dilutes the ownership interests of all existing sub-account holders because the purchaser acquires a larger percentage of ownership interest of the sub-account than the purchaser would have acquired had NATIONWIDE not used stale prices of foreign securities to calculate the AUV.

37. Similarly, every redemption of NATIONWIDE sub-account units at an artificially high AUV dilutes the ownership interests of all other existing sub-account holders because the redeemer depletes subaccount assets more than they would have been depleted had NATIONWIDE not used stale prices of foreign securities to calculate the AUV.

38. NATIONWIDE'S use of stale prices of foreign securities to calculate the AUV does not, in and of itself, injure sub-account holders. Indeed, NATIONWIDE'S methodology for calculating the AUV could sometimes benefit holders to the extent that someone purchases units at an artificially high AUV or someone redeems units at an artificially low AUV. Moreover if no trading occurs on a day when the AUV is artificially high or artificially low, holders are not injured.

39. Thus, it is NATIONWIDE'S failure to prohibit purchases of sub-account units at an artificially low AUV and redemptions of sub-account

units at an artificially high AUV which injures existing holders of sub-account units.

40. The wealth represented by market timing dilution comes exclusively and dollar-for-dollar out of the pockets of existing holders of sub-account units.

PLAINTIFF AND CLASS MEMBERS HAVE NO FEDERAL SECURITIES LAW CLAIM

41. With respect to market timing or stale price trading in its annuities' sub-accounts, NATIONWIDE did not make any untrue statement or fail to disclose any material fact in connection with Plaintiff's or class members' purchases or sales of such annuities or purchases or sales of units in NATIONWIDE'S annuities' sub-accounts.

42. With respect to market timing or stale price trading in its annuities' sub-accounts, NATIONWIDE did not use or employ any manipulative or deceptive device or contrivance in connection with Plaintiff's or class members' purchases or sales of such annuities or purchases or sales of units in NATIONWIDE'S annuities' sub-accounts.

43. Market timing and stale price trading in NATIONWIDE's annuity sub-accounts does not materially benefit NATIONWIDE, its directors, officers or employees.

44. No purchaser of NATIONWIDE'S sub-account units is injured, in connection with his purchase, by any other trader's purchase of sub-account units at an artificially low AUV.

45. No purchaser of NATIONWIDE'S sub-account units is injured, in connection with his purchase, by any other trader's redemption of sub-account units at an artificially high AUV.

46. No seller of NATIONWIDE'S sub-account units is injured, in connection with the redemption of his sub-account units, by any other trader's purchase of sub-account units at an artificially low AUV.

47. No seller of NATIONWIDE'S sub-account units is injured, in connection with the redemption of his sub-account units, by any other trader's redemption of sub-account units at an artificially high AUV.

48. As a result, market timing and stale price trading injure only holders and do not injure purchasers or sellers of NATIONWIDE'S sub-account units.

49. Accordingly, because NATIONWIDE, with respect to market timing or stale price trading in its annuities' sub-accounts, did not make an untrue statement, fail to disclose any material fact or use or employ any manipulative or deceptive device or contrivance in connection with Plaintiff's or class members' purchases or sales of such annuities or purchases or sales of units in NATIONWIDE'S annuities' sub-accounts, Plaintiff and class members have no cause of action under federal securities law.

STALE PRICE TRADING DOES NOT INJURE NATIONWIDE AND IS THEREFORE NOT A SHAREHOLDERS' DERIVATIVE CLAIM

50. Market timing and stale price trading dilutes the value of investors' pooled investment in NATIONWIDE sub-accounts which, as alleged above, are the separate property of the investors and not the property of Nationwide.

51. Market timing and stale price trading does not injure NATIONWIDE or its property.

52. As a result, the dilution that occurs through market timing and stale price trading injures annuity holders directly.

53. Accordingly, Plaintiff brings this suit for mismanagement against NATIONWIDE as a direct action and not as a shareholders' derivative action.

54. Plaintiff and class members are not shareholders (or the equivalent) of NATIONWIDE, and for this additional reason cannot bring this suit against NATIONWIDE as a shareholder derivative action.

CLASS ACTION ALLEGATIONS

55. Through his ownership of the Nationwide Individual Flexible Purchase Payment Deferred Variable Annuity, Plaintiff at all times relevant to this Complaint held units in the Massachusetts Investors Growth Stock Fund sub-account for the purpose of long-term investment.

56. Plaintiff brings this class action on behalf of himself and on behalf of a class of all persons in the United States who held (through their

ownership of an NATIONWIDE annuity or insurance products) units of any NATIONWIDE sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing or stale price trading activity.

i. Excluded from the class are NATIONWIDE and any of its parent, subsidiary or affiliated corporations, as well as any of their controlled persons, officers, directors, agents, servants or employees, and the immediate family members of any such person; any judge who may preside over this case; all persons who have claims in excess of $75,000; and any investor who engaged in market timing trading in the NATIONWIDE sub-accounts which are the subject of this First Amended Complaint.

ii. Excluded from this Complaint are any claims Plaintiff or any class member may have based upon NATIONWIDE'S conduct in connection with Plaintiff's or any class member's purchase or sale of any NATIONWIDE annuity or insurance products.

57. Alternatively, if NATIONWIDE is found, with respect to market timing or stale price trading in its annuities' sub-accounts, to have made any untrue statement, failed to disclose any material fact, or used or employed any manipulative or deceptive device or contrivance, Plaintiff brings this class action on behalf of himself and on behalf of a

class of all persons in the United States who, prior to NATIONWIDE'S untrue statement, omission of material fact, use or employment of any manipulative or deceptive device or contrivance, held (through their ownership of an NATIONWIDE annuity or insurance products) units of any NATIONWIDE sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing trading activity.

i. Excluded from this alternative class are NATIONWIDE and any of its parent, subsidiary or affiliated corporations, as well as any of their controlled persons, officers, directors, agents, servants or employees, and the immediate family members of any such person; any judge who may preside over this case; all persons who have claims in excess of $75,000; and any investor who engaged in market timing trading in the Nationwide sub-accounts which are the subject of this First Amended Complaint.

ii. Excluded from this Complaint are any claims Plaintiff or any class member may have with respect to any purchase or sale of any NATIONWIDE annuity or insurance products after NATIONWIDE'S untrue statement, mission of material fact, or use or employment of any manipulative or deceptive device or contrivance.

iii. Also excluded from this alternative class is any person whose only purchases of any NATIONWIDE annuity or insurance products all occurred after NATIONWIDE'S untrue statement, omission of material fact, or use or employment of any manipulative or deceptive device or contrivance.

iv. Also excluded from this Complaint are any other claims Plaintiff or any class member may have based upon NATIONWIDE'S conduct in connection with Plaintiff's or any class member's purchase or sale of any NATIONWIDE'S annuity or insurance products.

58. Plaintiff is a member of the class and will fairly and adequately assert and protect the interests of the class. Plaintiff's interests are coincident with, and not antagonistic to, those of other class members.

59. Plaintiff has retained attorneys who are experienced in class action litigation.

60. Members of the class are so numerous and geographically dispersed that joinder of all members is impracticable. While Plaintiff cannot ascertain the exact number and identity of class members prior to discovery, on information and belief, there are thousands of class members and their identity can be ascertained from NATIONWIDE'S books and records.

61. There are questions of law or fact common to the class.

62. Those common questions predominate over any questions affecting only individual members of the class.

63. Those predominating, common questions include, but are not limited to, the following:

i. whether in calculating daily AUV's NATIONWIDE negligently failed to evaluate on a daily basis price relevant information available after the close of the exchanges in which the securities in the mutual funds' portfolios trade, but before the calculation of the daily AUV, which was likely to change the value of the mutual fund securities and thus sub-account AUV's;

ii. whether in calculating daily AUV's NATIONWIDE negligently failed to implement valuation and pricing policies and procedures which would account for price relevant events occurring after the close of the exchanges in which the securities in the mutual funds' portfolios trade, but before the calculation of the daily AUV, whenever closing prices of mutual fund portfolio securities did not reflect their current market values;

iii. whether NATIONWIDE negligently failed to protect its sub-account holders from market timing or stale price trading;

iv. whether Plaintiff and the class have sustained damages as a result of NATIONWIDE'S negligence; and/or

v. the proper measure of any such damages.

64. The prosecution of separate actions by individual members of the class would create a risk of:

i. whether in calculating daily AUV's NATIONWIDE negligently failed to evaluate on a daily basis price relevant information available after the close of the exchanges in which the securities in the mutual funds' portfolios trade, but before the calculation of the daily AUV, which was likely to change the value of the mutual fund securities and thus sub-account AUV's;

ii. whether in calculating daily AUV's NATIONWIDE negligently failed to implement valuation and pricing policies and procedures which would account for price relevant events occurring after the close of the exchanges in which the securities in the mutual funds' portfolios trade, but before the calculation of the daily AUV, whenever closing prices of mutual fund portfolio securities did not reflect their current market values;

iii. whether NATIONWIDE negligently failed to protect its sub-account holders

from market timing or stale price trading;

iv. whether Plaintiff and the class have sustained damages as a result of NATIONWIDE'S negligence; and/or

v. the proper measure of any such damages.

64. The prosecution of separate actions by individual members of the class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the class; and/or

ii. adjudication with the respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protest their interest.

65. The class action method is appropriate for the fair and efficient prosecution of this action.

66. Individual litigation of all claims, which might be brought by all class members, would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides a manageable means of bringing to rapid conclusion the claims of all persons with whom Plaintiff is similarly situated with respect to NATIONWIDE'S negligence as alleged herein.

COUNT I

(COMMON LAW NEGLIGENCE)

67. Plaintiff repeats and incorporates by reference paragraphs 1 through 66 as if fully set forth here.

68. As a specialist in the field of investment management, it became NATIONWIDE'S duty to exercise that degree of knowledge, skill and care ordinarily used, or which should be used, by reasonably well qualified members of the investment management profession, including but not limited to the duties:

i. to use mutual fund share values predicated upon current market values when valuing sub-accounts and setting their daily AUVs; and/or

ii. to prevent market timing and/or stale price trading in sub-accounts to prevent the dilution of the ownership interests of existing sub-account holders.

69. NATIONWIDE knew or should have known that the closing prices for the foreign securities held in its sub-accounts' corresponding mutual funds' portfolios did not represent current market values of those foreign securities whenever price relevant events had occurred after the closing of foreign securities markets but before NATIONWIDE'S calculation of daily AUVs.

70. NATIONWIDE was negligent in one or more of the following ways:

i. failing to evaluate on a daily basis price relevant information available to NATIONWIDE after the close of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

ii. failing to adjust calculation of daily AUVs to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before NATIONWIDE'S calculation of daily AUVs; and/or

iii. failing to implement policies and procedures which would protect sub-account holders such as Plaintiff and class members from the dilution effect of market timing and/or stale price trading.

71. As a direct and proximate result of NATIONWIDE'S negligence, Plaintiff and the class have suffered damages in an amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages and costs.

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS, ILLINOIS

Cause No. 04-CV-00372-CJP

MATTHEW WIGGENHORN, individually and on behalf of all others similarly situated
Plaintiff,

v.

EQUITABLE LIFE ASSURANCE SOCIETY, OF THE UNITED STATES
Defendant.

[Filed June 10, 2005]

FIRST AMENDED COMPLAINT

* * * * *

EQUITABLE LIFE'S VARIABLE ANNUITY FUNDS

6. People invest in variable annuities for the same reasons people invest in mutual funds: their investment is pooled with those of thousands of other investors thereby achieving economies of scale that investors could not otherwise enjoy individually. For instance, investors can be collectively invested in

a far more richly diversified portfolio of securities than they would be able to invest in individually; collectively they enjoy the benefits of professional management of their funds (such as investment research and daily monitoring of markets and securities) for a miniscule fraction of the cost they would pay individually because the costs are spread among thousands of investors; and, because large blocks of securities are traded on behalf of thousands of investors, trading transactional costs are vastly reduced because the transactional costs for the single "collective investor" are also spread among the thousands of actual investors invested in the fund. In addition, investors in variable annuities enjoy tax deferment on their investment as well as a death benefit.

7. The Equitable Life annuities which are the subject of this Complaint consist of a "separate account" in which Equitable Life keeps investors' assets separate from Equitable Life's own assets.

8. Investors' funds in the separate account are the property of the investors and not the property of Equitable Life.

9. Each annuity's separate account is further divided into multiple sub-accounts, each of which corresponds to a single mutual fund.

10. Investors' funds in the sub-accounts are the property of the investors and not the property of Equitable Life.

11. Equitable Life invests the investors' funds in each sub-account in that sub-account's corresponding mutual fund. These mutual funds are maintained exclusively for variable annuity or

variable life insurance products, although they often bear names very similar to those of retail mutual funds.

12. Because the funds in the sub-accounts are investors' funds, when Equitable Life invests those funds in a mutual fund, the investors are the real owners of the shares of the mutual fund which Equitable Life only nominally holds in its name on behalf of and for the benefit of the investors.

13. Equitable Life credits each investor with "units" of the sub-accounts in which the investor's funds are invested.

14. Units in Equitable Life's sub-accounts can be traded, either by purchase or redemption, only once per day at 4:00 p.m. Eastern Time.

15. Equitable Life establishes a new daily "unit value" (UV) for each sub-account once every trading day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time.

16. At the end of each trading day, Equitable Life (either directly or through a fund manager) valuates the assets in each mutual fund and establishes a "net asset value" for each mutual fund. That net asset value is the same net asset value Equitable Life uses to establish the corresponding sub-account's daily UV.

17. The two factors which have the largest influence on the UV are the value of the mutual fund portfolio and the total number of investors invested in that mutual fund (*i.e.*, the total number of investors who hold units in the sub-account which corresponds to any given mutual fund).

18. Because the sub-accounts' UV's are based upon the per share value of the underlying mutual fund, the value of an investor's sub-account units will fluctuate as the value of the corresponding mutual fund fluctuates.

19. Equitable Life contracts with fund managers who manage the mutual funds in which Equitable Life invests sub-account funds.

20. The fund managers handle the day-to-day tasks associated with managing an investment portfolio, such as investment management and valuation of the mutual fund's underlying portfolio of securities.

EQUITABLE LIFE'S SUB-ACCOUNTS' CORRESPONDING MUTUAL FUNDS' PORTFOLIOS INCLUDE FOREIGN SECURITIES

21. Some of the mutual funds in which the annuity sub-accounts are invested include in their portfolios securities which are traded in markets outside of the United States.

22. In valuing the assets of a mutual fund, the fund manager uses the last trade price in the home market of each of the securities in its portfolio. The home markets for the foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and/or Sydney. These markets are located in time zones that are five to fifteen hours ahead of Eastern Time.

23. Thus, a five to fifteen hour interval elapses between the close of the foreign securities

markets and Equitable Life's calculation of its sub-accounts' UV's.

24. For example, the exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When Equitable Life or its fund managers calculate the value of the mutual funds' portfolios, it uses any Japanese securities' closing prices in the Tokyo exchange. Thus, when Equitable Life calculates its sub-accounts UV's based upon the mutual fund valuation, Equitable Life necessarily incorporates the closing prices on the Tokyo exchange for any Japanese securities, closing prices that have been static for 14 hours.

25. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the U.S. markets and value movements in foreign markets. If the U.S. markets experience an upward movement in values, it can be predicted that foreign markets will move upward once trading begins the next day. Similarly, if the U.S. markets experience a downward movement in values, it can be predicted that foreign markets will move downward once trading begins the next day.

26. Studies also demonstrate that the greater the percentage increase or decrease in the value of U.S. markets, the more likely foreign markets will post corresponding value movements on

the subsequent trading day. The probability that the value movements of foreign markets will follow the previous day's value movements in U.S. markets is directly correlated to the degree or extent of the value movement of U.S. markets.

EQUITABLE LIFE'S MISMANAGEMENT EXPOSES INVESTORS TO MARKET TIMING

27. A significant portion of the underlying securities in the mutual fund portfolios associated with the Equitable Life sub-accounts are listed on foreign exchanges and trade during each market's respective session.

28. When Equitable Life or its fund managers establish the share values of the mutual funds in which Equitable Life invests the sub-accounts' funds, they do not take into account on a daily basis any price relevant information (such as such as value movements in the U.S. markets, changes in world equity market indices, changes in the value of American Depository Receipts (ADRs), and fluctuations in foreign currency futures markets) that has become available in the interval between the close of the foreign markets and the calculation of the mutual funds' share values.

29. Such price relevant information is significant because the final market prices of the foreign securities often have become stale because they no longer reflect the current market value of the securities.

30. When the foreign securities prices are stale, Equitable Life's (or its fund managers') use of such stale prices of the foreign securities to calculate

the UV causes the UV to be either artificially high or artificially low.

31. Equitable Life's calculation of artificially high or artificially low UV's exposed existing subaccount holders to market timing traders who regularly purchase and redeem units of Equitable Life's sub-accounts as part of a profitable, stale-price trading strategy.

32. Market timing is a short-term trading strategy by which the market timing trader takes advantage of the artificially low or high UV's. Because Equitable Life uses stale pricing of foreign securities to calculate mutual fund share values and thus sub-account UV's, market timers are able to predict changes in the UV's based on events that occur after the close of foreign securities markets but before the U.S. markets close.

33. Market timers buy units of Equitable Life sub-accounts on days when the U.S. markets move up, and they redeem units when the U.S. markets move down.

34. Due to Equitable Life's use of stale pricing, anyone who buys Equitable Life's sub-account units on days when the U.S. markets move up are buying units whose prices are artificially low, irrespective of whether the purchaser intends to market time. Similarly, anyone who redeems Equitable Life's subaccount units on days when the U.S. markets move down are redeeming units whose prices are artificially high, irrespective of whether the purchaser intends to market time.

EQUITABLE LIFE'S FAILURE TO PROHIBIT MARKET TIMING DILUTES HOLDERS' OWNERSHIP INTERESTS

35. Every purchase of Equitable Life sub-account units at an artificially low UV dilutes the ownership interests of all existing sub-account holders because the purchaser acquires a larger percentage of ownership interest of the sub-account than the purchaser would have acquired had Equitable Life not used stale prices of foreign securities to calculate the UV.

36. Similarly, every redemption of Equitable Life sub-account units at an artificially high UV dilutes the ownership interests of all other existing sub-account holders because the redeemer depletes subaccount assets more than they would have been depleted had Equitable Life not used stale prices of foreign securities to calculate the UV.

37. Equitable Life's use of stale prices of foreign securities to calculate the UV does not, in and of itself, injure sub-account holders. Indeed, Equitable Life's methodology for calculating the UV could, at least theoretically, sometimes benefit holders to the extent that someone purchases units at an artificially high UV or someone redeems units at an artificially low UV. Moreover, if no trading occurs on a day when the UV is artificially high or artificially low, holders are not injured.

38. Thus, it is Equitable Life's failure to prohibit purchases of sub-account units at an artificially low UV and redemptions of sub-account units at an artificially high UV which injures existing holders of subaccount units.

39. The wealth represented by market timing dilution comes exclusively and dollar-for-dollar out of the pockets of existing holders of sub-account units.

PLAINTIFF AND CLASS MEMBERS HAVE NO FEDERAL SECURITIES LAW CLAIM

40. Stale price trading in Equitable Life annuity sub-accounts does not materially benefit Equitable Life, its directors, officers or employees.

41. With respect to market timing or stale price trading in its annuities' sub-accounts, Equitable Life did not make any untrue statement or fail to disclose any material fact in connection with Plaintiff's or class members' purchases or sales of such annuities or purchases or sales of units in Equitable Life's annuities' sub-accounts.

42. With respect to market timing or stale price trading in its annuities' sub-accounts, Equitable Life did not use or employ any manipulative or deceptive device or contrivance in connection with Plaintiff's or class members' purchases or sales of such annuities or purchases or sales of units in Equitable Life's annuities' sub-accounts.

43. No purchaser of Equitable Life's sub-account units is injured, in connection with his purchase, by any other purchaser's purchase of sub-account units at an artificially low UV.

44. No purchaser of Equitable Life's sub-account units is injured, in connection with his purchase, by any other trader's redemption of sub-account units at an artificially high UV.

45. No seller of Equitable Life's sub-account units is injured, in connection with the redemption of his sub-account units, by a purchaser's purchase of sub-account units at an artificially low UV.

46. No seller of Equitable Life's sub-account units is injured, in connection with the redemption of his sub-account units, by any other trader's redemption of sub-account units at an artificially high UV.

47. As a result, stale price trading does not injure purchasers or sellers of Equitable Life's subaccount units.

48. Accordingly, because Equitable Life, with respect to market timing or stale price trading in its annuities' sub-accounts, did not make an untrue statement, fail to disclose any material fact or use or employ any manipulative or deceptive device or contrivance in connection with Plaintiff's or class members' purchases or sales of such annuities or purchases or sales of units in Equitable Lifes annuities' sub-accounts Plaintiff and class members have no cause of action under federal securities law.

STALE PRICE TRADING DOES NOT INJURE EQUITABLE LIFE AND IS THEREFORE NOT A SHAREHOLDERS' DERIVATIVE CLAIM

49. Market timing and stale price trading dilutes the value of investors' pooled investment in Equitable Life sub-accounts which, as alleged above, are the separate property of the investors and not the property of Equitable Life.

50. Market timing and stale price trading does not injure Equitable Life or its property.

51. As a result, the dilution that occurs through market timing and stale price trading injures shareholders directly.

52. Accordingly, Plaintiff brings this suit for mismanagement against Equitable Life as a direct action and not as a shareholders' derivative action.

CLASS ACTION ALLEGATIONS

53. Through his ownership of the Equitable Life Equi-Vest Variable Annuity, Plaintiff at all times relevant to this Complaint held units in the Eq-Alliance International sub-account for the purpose of long-term investment.

54. Plaintiff brings this class action on behalf of himself and on behalf of a class of all persons in the United States who held (through their ownership of an Equitable Life annuity or insurance products) units of any Equitable Life sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing or stale price trading activity.

i. Excluded from the class are Equitable Life and any of its parent, subsidiary or affiliated corporations, as well as any of their controlled persons, officers, directors, agents, servants or employees, and the immediate family members of any such person; any judge who may preside over this case; all persons who have claims in excess of $75,000; and any investor who engaged in market timing trading in the Equitable Life sub-accounts which are the subject of this Complaint.

ii. Excluded from this Complaint are any claims Plaintiff or any class member may have based upon Equitable Life's conduct in connection with Plaintiff's or any class member's purchase or sale of any Equitable Life annuity or insurance products.

55. Alternatively, if Equitable Life is found, with respect to market timing or stale price trading in its annuities' sub-accounts, to have made any untrue statement, failed to disclose any material fact, or used or employed any manipulative or deceptive device or contrivance, Plaintiff brings this class action on behalf of himself and on behalf of a class of all persons in the United States who, prior to Equitable

Life's untrue statement, omission of material fact, use or employment of any manipulative or deceptive device or contrivance, held (through their ownership of an Equitable Life annuity or insurance products) units of any Equitable Life sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing trading activity.

i. Excluded from the class are Equitable Life and any of its parent, subsidiary or affiliated corporations, as well as any of their controlled persons, officers, directors, agents, servants or employees, and the immediate family members of any such person; any judge who may preside over this case; all persons who have claims in excess of

$75,000; and any investor who engaged in market timing trading in the Equitable Life sub-accounts which are the subject of this Complaint.

ii. Excluded from this Complaint are any claims Plaintiff or any class member may have with respect to any purchase or sale of any Equitable Life annuity or insurance products after Equitable Life's untrue statement, omission of material fact, or use or employment of any manipulative or deceptive device or contrivance.

iii. Also excluded from the class is any person whose only purchases of any Equitable Life annuity or insurance products all occurred after Equitable Life's untrue statement, omission of material fact, or use or employment of any manipulative or deceptive device or contrivance.

iv. Also excluded from this Complaint are any other claims Plaintiff or any class member may have based upon Equitable Life's conduct in connection with Plaintiff's or any class member's purchase or sale of any Equitable Life annuity or insurance products.

56. Plaintiff is a member of the class and will fairly and adequately assert and protect the interests of the class. Plaintiff's interests are coincident with, and not antagonistic to, those of other class members.

57. Plaintiff has retained attorneys who are experienced in class action litigation.

58. Members of the class are so numerous and geographically dispersed that joinder of all members is impracticable. While Plaintiff cannot ascertain the exact number and identity of class members prior to discovery, on information and belief, there are thousands of class members and their identity can be ascertained from Equitable Life's books and records.

59. There are questions of law or fact common to the class.

60. Those common questions predominate over any questions affecting only individual members of the class.

61. Those predominating, common questions include, but are not limited to, the following:

i. whether in calculating daily UV's Equitable Life negligently failed to evaluate on a daily basis price relevant information available after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the calculation of the daily UV, which was likely to change the value of the mutual fund securities and thus sub-account UV's;

ii. whether in calculating daily UV's Equitable Life negligently failed to implement valuation and pricing policies and procedures which would

account for price relevant events occurring after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the calculation of the daily UV, whenever closing prices of mutual fund portfolio securities did not reflect their current market values;

iii. whether Equitable Life negligently failed to protect its sub-account holders from market timing or stale price trading;

iv. whether Plaintiff and the class have sustained damages as a result of Equitable Life's negligence; and/or

v. the proper measure of any such damages.

62. The prosecution of separate actions by individual members of the class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the class; and/or

ii. adjudication with the respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protest their interest.

63. The class action method is appropriate for the fair and efficient prosecution of this action.

64. Individual litigation of all claims, which might be brought by all class members, would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides a manageable means of bringing to rapid conclusion the claims of all persons with whom Plaintiff is similarly situated with respect to Equitable Life's negligence as alleged herein.

COUNT I

(COMMON LAW NEGLIGENCE)

65. Plaintiff repeats and incorporates by reference paragraphs 1 through 64 as if fully set forth here.

66. As a specialist in the field of investment management, it became Equitable Life's duty to exercise that degree of knowledge, skill and care ordinarily used, or which should be used, by reasonably well qualified members of the investment management profession, including but not limited to the duties:

i. to use mutual fund share values predicated upon current market values when valuing sub-accounts and setting their daily UV's; and/or

ii. to prevent market timing and/or stale price trading in sub-accounts to prevent the dilution of the ownership interests of existing sub-account holders.

67. Equitable Life knew or should have known that the closing prices for the foreign securities held in its sub-accounts' corresponding

mutual funds' portfolios did not represent current market values of those foreign securities whenever price relevant events had occurred after the closing of foreign securities markets but before Equitable Life's calculation of daily UV's.

68. Equitable Life was negligent in one or more of the following ways:

i. failing to evaluate on a daily basis price relevant information available to Equitable Life after the close of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

ii. failing to adjust calculation of daily UV's to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before Equitable Life's calculation of daily UV's; and/or

iii. failing to implement policies and procedures which would protect sub-account holders such as Plaintiff and class members from the dilution effect of market timing and/or stale price trading.

69. As a direct and proximate result of Equitable Life's negligence, Plaintiff and the class have suffered damages in an amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages and costs.

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

Cause No. 04-CV-00037

NITIKA MEHTA, AS TRUSTEE OF THE N.D. MEHTA LIVING TRUST, individually and on behalf of all others similarly situated
Plaintiff,

v.

AIG SUNAMERICA LIFE ASSURANCE CO. F/K/A ANCHOR NATIONAL LIFE INSURANCE COMPANY
Defendant.

[Filed Dec. 10, 2003]

COMPLAINT

* * * * *

5. The mutual funds in which the sub-accounts invest are managed by investment advisors with which Defendant AIG SunAmerica Life contracts. The investment advisors handle the day to day tasks associated with managing an investment portfolio, such as investment management and valuation of the fund's underlying portfolio of securities. At the end of each trading day a share value is computed for each of the funds associated

with the sub-accounts. Based on these valuations, Defendant AIG SunAmerica Life then calculates the accumulation unit value ("AUV") for each of the respective sub-accounts offered within its annuity product.

6. In exchange for his or her investment into the various sub-accounts, the investor is issued accumulation units for each sub-account in which he invests. The number of accumulation units the investor receives is determined by dividing the total cash investment in each sub-account by the price per accumulation unit of the sub-account. The value of the investor's AUV will fluctuate based on the value of the mutual fund shares purchased on the investor's behalf in each sub-account to which the investor has allocated cash.

7. Plaintiff charges Defendant AIG SunAmerica Life with engaging in an unlawful course of business wherein it failed to use current market values when valuing sub-accounts and setting their daily AUV and also allowed certain favored investors to market time trades in funds held by sub-accounts of various annuities including the Polaris II variable annuity. In contravention of its fiduciary responsibilities and other obligations, AIG SunAmerica Life failed to implement and enforce proper sub-account valuation and accumulation unit pricing policies and procedures and other restrictions so as to protect long term contract holders from favored investors that were allowed to market time their trades of accumulation units of various funds including the Alliance Global Equities Fund. Such

timing improperly allowed certain investors to trade in and out of the sub-accounts to exploit short-term moves in the sub-account's AUVs and to take advantage of the after-hours trading not available to other annuity investors.

8. This Court has jurisdiction over the subject matter and the parties pursuant to 735 ILCS 5/2-209.

9. This Court has jurisdiction over Defendant AIG SunAmerica Life because it is authorized to conduct business in Illinois and has intentionally availed itself of the laws and markets of Illinois in the promotion, sale, marketing, and distribution of its variable annuity contracts.

10. Venue is proper in this County pursuant to 735 ILCS 5/2-101.

AIG SUNAMERICA LIFE'S UNLAWFUL CONDUCT

11. The securities held by the mutual fund purchased by Defendant's sub-account for its portfolio are traded in markets both within the United States and outside of the United States.

12. Variable annuity issuers such as Defendant AIG SunAmerica Life have been tremendously successful in convincing investors such as Plaintiff to hold their variable annuity contracts by effectively marketing the various advantages of long term ownership of variable annuities over direct investment in securities including professional management,

diversification, insurance protection and tax deferral.

13. Accumulation units of variable annuity sub-accounts are sold to investors such as Plaintiff at a price based upon the AUV plus applicable sales charges. Investors in accumulation units of the sub-accounts may redeem their accumulation units at the AUV less any redemption or surrender charges.

14. Each day, a new AUV for each of Defendant AIG SunAmerica Life's sub-accounts is calculated by determining the total value of the sub-account assets, subtracting the total liabilities, including charges and deductions, and then dividing by the total number of accumulation units.

15. Because the sales and redemption prices are based upon the sub-account's AUV, which, in turn, is based on the value of the underlying mutual fund's portfolio of securities, Defendant AIG SunAmerica Life recalculates the sub-account AUV every business day. Defendant AIG SunAmerica Life sets the sub-account AUV once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time. The AUV of the accumulation units is reported by Defendant AIG SunAmerica Life to the National Association of Securities Dealers (NASD) for public distribution.

16. In valuing its underlying mutual fund assets, the mutual fund uses the last trade price in the home market of each of the securities in its portfolio. Subsequently, Defendant AIG

SunAmerica Life relies on these calculations in setting its daily sub-account AUV. A significant portion of the securities in Defendant AIG SunAmerica Life's sub-account's mutual fund portfolio are foreign securities. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time.

17. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying mutual fund portfolio do not reflect current market values at the time Defendant AIG SunAmerica Life relies on those prices when setting its sub-account AUV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current

market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADR's, foreign currency futures markets and the correlations between the value of the fund's securities and these bench marks, Defendant AIG SunAmerica Life does not make any adjustment to the mutual fund's value prior to calculating sub-account AUV and setting accumulation unit price every business day.

18. The positive correlation between the upward or downward movement of value in the United States market and subsequent movements in foreign markets around the world is between 0.7 and 0.8. A value of 0.0 equates to absolutely no correlation between value movements in United States markets and subsequent movements in foreign markets. A value of 1.0 equates to an absolute correlation between value movements in United States markets and subsequent value movements in foreign markets.

19. Studies of world financial markets demonstrate that the greater the percentage increase or decrease in the value of United States markets, the more likely foreign markets will post corresponding value movements on subsequent days. The probability that the value movements of foreign markets will follow the previous day's value movements in United States markets is directly correlated with the degree or extent of the value movement of United States markets.

20. Since many of the home markets for the foreign securities in the sub-account's mutual fund purchased by Defendant AIG SunAmerica Life last traded hours before the setting at 4:00 p.m. Eastern of the sub-account AUV, the closing prices used to calculate the mutual fund share price are stale and do not reflect price relevant information available subsequent to the foreign security's last trade that will affect the value of such security. Since Defendant AIG SunAmerica Life relies on its underlying mutual fund's closing prices in calculating its daily AUV, Defendant's AUV does not reflect subsequent available price relevant information and does not represent an accurate value.

21. During the interval that elapses between the time that the mutual funds purchased by Defendant AIG SunAmerica Life set their share value, and Defendant AIG SunAmerica Life in turn, calculates its AUV (and releases it to the NASD for communication to the public) on consecutive days, the securities markets in Australia, Japan, Taiwan, Hong Kong, Malaysia, Singapore, Russia, Germany, France and the United Kingdom have traded for an entire session from open to close.

22. For example, the exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When Defendant AIG SunAmerica Life's mutual

fund calculated the value of its portfolio securities using closing prices from this exchange and Defendant AIG SunAmerica Life sets its sub-account AUV based upon those values, Defendant relies upon closing prices for securities traded on this exchange that have been static for 14 hours.

23. A significant portion of the underlying foreign securities in the mutual fund portfolios associated with the Polaris II sub-accounts are listed on foreign exchanges and trade during each market's respective session. The share values set by these mutual funds and used by Defendant AIG SunAmerica Life in setting its AUV do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the AUVs. Price relevant information, such as knowledge of the United States market result, the continuous trading of world equity market indexes, ADR's, foreign currency futures markets, and the correlations between the value of the funds' securities and these bench marks impacts the valuation of the underlying securities in the mutual funds in which sub-account proceeds are invested and its subsequent AUV calculation and is significant because the final market prices have become stale and do not reflect the current market value of the securities.

24. "Timing" is an arbitrage strategy involving short-term trading that can be used to profit from the process Defendant AIG

SunAmerica Life's mutual funds use to calculate the value of securities held in the funds' portfolios, which may not necessarily reflect the fair value of such securities as of the time the AUV is calculated.

25. By failing to make daily adjustments based upon correlations between upward or downward movements in United States and foreign markets, world equity index trading, ADR's, foreign currency futures, and by using the mutual fund's stale prices in valuing their accumulation units and setting their daily AUVs, Defendant AIG SunAmerica Life has exposed long term contract holders to market timing traders who regularly purchase and redeem accumulation units of Defendant's sub-accounts as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the AUV. Market timing traders are able to predict changes in the AUV because of the positive correlations between value movements in United States markets and foreign markets.

26. The stale price strategy of market timers who trade in accumulation units of Defendant AIG SunAmerica Life's sub-accounts is to buy accumulation units on days when the United States market moves up and to sell (redeem) accumulation units when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the variable annuity's deadline for

buying or selling (redeeming) accumulation units in Defendant AIG SunAmerica Life's sub-accounts on any particular business day. Because Defendant AIG SunAmerica Life cannot make an investment into its underlying mutual fund and the mutual fund cannot buy or sell the foreign securities in its underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily AUV that values the accumulation units it issues and redeems, the accumulation units that Defendant AIG SunAmerica Life issues to and redeem from market timers do not reflect current market prices of the foreign securities held by the sub-account.

27. Due to the use of stale prices by Defendant, market timers who buy Defendant's accumulation units on days when the United States market moves up are buying discounted accumulation units at the expense of other contract holders because the sub-accounts' underlying foreign securities assets are undervalued as of the time of the accumulation unit purchase.

28. Due to the use of stale prices by Defendant, market timers who sell (redeem) Defendant's accumulation units on days when the United States market moves down are selling (redeeming) accumulation units at a premium at the expense of other sub-account contract holders because the underlying foreign securities assets are overvalued as of the time of the accumulation unit sale (redemption).

29. Accumulation units in Defendant AIG SunAmerica Life's sub-accounts can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

30. The excess profits that are obtained by market timing traders' taking advantage of the stale pricing of Defendant AIG SunAmerica Life's sub-accounts come at the expense of fellow contract holders who are non-trading long term buy and hold investors. The transfer of wealth from the non-trading long term buy and hold contract holders to the market timers trading Defendant's units in Defendant's sub-accounts occurs through dilution.

31. Market timing traders pay cash to Defendant AIG SunAmerica Life's sub-account when they purchase discounted accumulation units. Market timing traders receive cash from Defendant's sub-account when they sell (redeem) their accumulation units at a premium. Long term contract holders suffer a dilution in the AUV of their accumulation units in both instances. When market timing traders are able to buy accumulation units at a discount, long term contract holders suffer dilution because the cash received by the sub-account for the accumulation units purchased is less than the value of Defendant's mutual fund's underlying foreign securities because of the stale pricing utilized by Defendant. Likewise, when market timing traders are able to sell (redeem) accumulation units at a premium, long term contract holders suffer dilution because the cash paid out by the sub-account for the accumulation units redeemed is

more than the value of Defendant's mutual fund's underlying foreign securities, again due to the stale pricing utilized by Defendant. In both instances, long term contract holder accumulation unit AUV's are diluted and the wealth represented by that diluted amount is transferred to market timing traders.

32. By failing to enforce restrictions and prevent timing activities, Defendant AIG SunAmerica Life gives market timing traders the opportunity to earn risk-free returns. Unlike other market timing based trading, market timers who trade Defendant's sub-accounts do not have to look into the future to time their purchases and redemptions of accumulation units. Rather, they have the luxury of being able to look backwards because Defendant's accumulation unit pricing fails to adjust for recognized correlations and uses stale prices in valuing its underlying portfolio securities.

33. Effective market timing captures an arbitrage profit that comes dollar-for-dollar out of the pockets of the long-term investors. Besides the wealth transfer through dilution, the market timers also harm long term investors in other ways.

34. Similar opportunities exist for market timers to exact illicit profits by trading in accumulation units of Defendant AIG SunAmerica Life's sub-account mutual funds that invest in securities issued by United States companies. Funds investing in small cap and thinly traded securities present an opportunity for market

timers to exploit market information and stale pricing valuations to reap profits at the expense of long term investors. Defendant AIG SunAmerica Life exposed long term annuity holders to market timing traders who regularly purchase and redeem accumulation units of sub-accounts investing in mutual funds with portfolios concentrated in small cap and thinly traded securities issued by United States companies.

THE PUBLIC DISCLOSURE OF MARKET TIMING ACTIVITIES IN ANNUITIES

35. On November 7, 2003, in an article entitled, "Mutual-Fund Scrutiny Spreads to Annuities, Regulators See the Fingerprints of Market Timers in the Accounts Often Held by Cautious Investors," The Wall Street Journal reported:

> Variable annuities, those combinations of insurance coverage and mutual-fund accounts that typically appeal mostly to older investors, also appear to have attracted customers from a much faster crowd in recent years – market timers.
>
> Market timers are the frenetic buyers and sellers of fund shares who are a prime focus of the current investigations into mutual-fund trading abuses. But while ordinary mutual funds have been under the

microscope in the investigations so far, it is becoming clear that fund accounts that are part of the investment options for variable annuities also have been used by market timers to make profitable trades at the expense of long-term investors.

"This has clearly become an area of focus for us," said Paul Roye, director of the Securities and Exchange Commission's investment-management division. "It seems there's the potential here for the same kinds of [improper] trading we're finding in mutual funds."

"Annuities appear to be an attractive area" for market timers, he said, noting that the SEC has requested information on possible market-timing practices from variable-annuity providers.

* * *

Because of their tax-deferred status on investment gains, their steady income streams that are tailored for retirees and their life-insurance features, variable annuities are typically thought of as

conservative choices for buy-and-hold investors. But as more information about the activities of market timers becomes known, some of those traits are precisely what attracted rogue market timers, who may have raised the expenses and whittled the returns of other variable-annuity investors in recent years.

Indeed, while regulators haven't bought any charges involving variable annuities yet, unusually large flows of money into and out of certain variable annuity accounts have attracted attention as an indication that kinetic traders, including some hedge funds, may have been practicing market-timing trades. Regulators in particular are looking for annuity investment options whose flows of money in and out are far larger than their net assets. Often such accounts with heavy trading are international funds, which are attractive to timers because the pricing of their shares may be based on out-of-date securities values.

For example, redemptions from the average international-stock variable-annuity sub account with at least $100 million in assets made up 174% of assets at the start of last year, compared with 67% for the average stock fund, says fund tracker Lipper Inc. Money flowing into these same funds averaged 167% of assets, compared with 53% for the average stock fund.

"These are very high ratios and that's what you're looking for" in trying to identify market-timing activity, said Eric Zitzewitz, an assistant professor of economics at Stanford Graduate School of Business who has studied timing practices in recent years. "For timers, 2002 was like 2000 for Bordeaux. Because it was so volatile it was a great year."

* * *

The variable-annuity industry, which oversees $880 billion in assets, says worries about timers are overblown. "We're not aware that [market timing] is presently a big problem, "Mr.

> DeGeorge said. That said, Mr. DeGeorge says he hasn't seen statistics on how widespread or effective timing controls, such as trade limits, have been.
>
> But Paul Haaga, chairman of the Investment Company Institute, the mutual-fund industry's largest trade group, and others in the mutual-fund business say they believe timing has become a particular problem for variable annuities, as well as for regular mutual funds, over the past five years as more-academic studies have outlined the strategy's efficacy.

36. In contravention of its fiduciary responsibilities and its own professed restrictions on market timing practices, Defendant AIG SunAmerica Life failed to prevent the market timing activities of certain favored investors. Defendant AIG SunAmerica Life permitted these market timers to time trades in the Alliance Global Equities Fund sub-account. Such timing improperly allowed certain investors to trade in and out of the sub-accounts and thereby exploit short-term moves and inefficiencies in the sub-accounts' AUV. Defendant's unlawful activities caused financial harm and detriment to the long-term investors in the Polaris II annuity.

CLASS ACTION ALLEGATIONS

37. Plaintiff brings this Complaint as a class action against Defendant AIG SunAmerica Life pursuant to 5/2-801 *et. Seq.*, of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held accumulation units of the Polaris II Alliance Global Equities sub-account for more than fourteen days ("long term accumulation unit holders") during the period commencing five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendant AIG SunAmerica Life, and parent, subsidiary, affiliate, or controlled person of Defendant, as well as the officers, directors, agents, servants or employees of Defendant, and the immediate family members of any such person. Also excluded is any judge who may preside over this case and all persons who have claims in excess of $75,000.

38. Plaintiff is a member of the class and will fairly and adequately assert and protect the interests of the class. The interest of the Plaintiff is coincident with, and not antagonistic to, those of other members of the class. Plaintiff has retained attorneys who are experienced in class action litigation.

39. Members of the class are so numerous and geographically dispersed that joinder of all members is impracticable. While the exact number and identity of Class members cannot be ascertained by Plaintiff prior to discovery, Plaintiff believes that there are

thousands of Class members, and that their identity can be ascertained from Defendant's books and records.

40. There are questions of law or fact common to the Class, which common questions predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

i. whether Defendant failed to properly disclose that favored investors were permitted to market time trades in certain funds held by the Polaris II variable annuities;

ii. whether Defendant failed to protect Alliance Global Equities sub-account holders from market timing traders of accumulation units who use these fund accumulation units as a trading vehicle to earn profits at the expense of long term variable annuity contract holders;

iii. whether the value of the accumulation units were artificially distorted by Defendant's acts;

iv. whether Defendant breached the contractual obligations it owed to Plaintiff and the Class;

v. whether Defendant breached the fiduciary obligations it owed to Plaintiff and the Class;

vi. whether Plaintiff and the Class have sustained damages and the proper measure of those damages;

vii. whether Plaintiff and the Class are entitled to an award of punitive damages against Defendant; and

viii. whether Plaintiff and the Class are entitled to declaratory and injunctive relief.

41. The prosecution of separate actions by individual members of the Class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the Class: and

ii. adjudication with the respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protest their interest.

42. The class action method is appropriate for the fair and efficient prosecution of this action.

43. Individual litigation of all claims, which might be brought by all class members, would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all

litigation of all claims arising from the conduct of the Defendant.

CLAIMS FOR RELIEF

COUNT I

(Negligence)

44. Plaintiff repeats and incorporates by reference paragraphs 1 through 43 as if fully set forth herein.

45. At all times relevant herein, Defendant AIG SunAmerica Life had a duty when valuing its sub-accounts and setting their daily AUV's to use mutual fund share values predicated upon current market values and to prevent market timing activities of certain favored investors in order to avoid diluting the value of long term contract holders' holdings.

46. Defendant AIG SunAmerica Life breached its duty of due care owed to Plaintiff and the Class by:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which the sub-account's portfolio securities trade, but before the setting of the daily AUV, which was likely to change the value of the securities and the value of its sub-accounts and the setting of their daily AUV;

ii. failing to properly adjust the value of its sub-accounts and the setting of

their daily AUV's when price relevant information available after the close of the exchange on which the sub-account's portfolio securities trade, but before the setting of the daily AUV, indicated a change in the value of the securities;

iii. failing to implement sub-account valuation and accumulation unit pricing policies and procedures so as to protect long term contract holders from market timing traders.

47. Defendant AIG SunAmerica Life is in the business of supplying information that guides others in their business transactions.

48. As a direct and proximate result of the Defendant's breach of its duty Plaintiff and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, attorneys' fees and costs.

COUNT II

(Gross Negligence)

49. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

50. It has been known for years that changes in trading prices of securities in sub-account portfolios may occur daily after the closing of the New York Stock Exchange.

51. Defendant knew, or was negligent in not knowing, that significant events affecting the value of its sub-accounts and the setting of their daily AUV regularly occurred after the close of the exchange on which the sub-account's portfolio securities traded, but before the setting of the daily AUV, which were likely to change the value of the securities and that ongoing market timing activities of certain favored investors diluted the value of long term contract holders' holdings.

52. With utter indifference or conscious disregard for the holdings of Plaintiff and the Class, Defendant breached its duties to Plaintiff and the class by, inter alia:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which the sub-account's portfolio securities trade, but before the setting of the daily AUV, which was likely to change the value of the securities and the value of its sub-accounts and the setting of their daily AUV;

ii. failing to properly adjust the value of its sub-accounts and the setting of their daily AUV's when price relevant information available after the close of the exchange on which the sub-account's portfolio securities trade, but before the setting of the

daily AUV, indicated a change in the value of the securities

iii. failing to implement sub-account valuation and accumulation unit pricing policies and procedures so as to protect long term contract holders from market timing traders.

53. Defendant AIG SunAmerica Life's reckless or intentional false representations are the proximate cause of the damages incurred by the Plaintiff and the class.

54. As a direct and proximate result of Defendant's breach of its duties, Plaintiff and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

COUNT III

(Breach of the Covenant of Good Faith and Fair Dealing)

55. Plaintiff repeats and incorporates by reference paragraphs 1 through 54 as if fully set forth herein.

56. Plaintiff and the Class contracted with Defendant AIG SunAmerica Life to purchase and invest in the Polaris II variable annuity with the Alliance Global Equities sub-account.

57. Implied in Plaintiff's and the Class' standardized Polaris II variable annuity contracts is a covenant of good faith and fair dealing that neither party will do anything to

impair, frustrate, or injure the right of the other to receive the benefits of their agreement.

58. Plaintiff and the Class complied with their contractual obligations by investing and holding accumulation units of the Alliance Global Equities sub-account of the Polaris II variable annuity, as well as their obligations of good faith and fair dealing.

59. Defendant AIG SunAmerica Life breached its covenant of good faith and fair dealing to Plaintiff and the Class by virtue of the acts and practices alleged above, including, routinely allowing market timing traders to trade the Alliance Global Equities sub-account at the expense of long term contract holders.

60. As a consequence of Defendant AIG SunAmerica Life's breaches of the implied covenant of good faith and fair dealing, Defendant AIG SunAmerica Life has wrongfully profited and continues to wrongfully profit from the activities of the market timers.

61. As a direct and proximate result of the Defendant AIG SunAmerica Life's breach of the covenant of good faith and fair dealing, Plaintiff and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, attorneys' fees and costs.

COUNT IV

(Breach of Fiduciary Duty)

62. Plaintiff repeats and incorporates by reference paragraphs 1 through 61 as if fully set forth herein.

63. Defendant AIG SunAmerica Life held and holds a special relationship with Plaintiff and the Class as a result of the following:

(a) Defendant AIG SunAmerica Life is a stock corporation. The stock holders select the board of directors who will manage Defendant AIG SunAmerica Life's assets, and the directors act as fiduciaries in managing Plaintiff's and Class' funds;

(b) Defendant AIG SunAmerica Life is an insurer characterized by elements of public interest which subject it to more stringent standards of conduct than those normally arising out of contract;

(c) Defendant AIG SunAmerica Life cultivated a relationship of trust and confidence in Plaintiff and Class Members, through its marketing, sales and servicing of the complex and sophisticated Polaris II variable annuity product purchased by Plaintiff and the Class;

(d) The variable annuities purchased by Plaintiff and the Class were contracts of adhesion that were prepared by Defendant AIG SunAmerica Life and were not subject to negotiation. Plaintiff and the Class did not possess bargaining power equal to that of Defendant AIG SunAmerica Life;

(e) Defendant AIG SunAmerica Life and its agents held themselves out as highly-skilled

insurance and financial experts, possessing the special knowledge and expertise needed to interpret and understand the complex and sophisticated funding methods and mechanics of the Polaris II variable annuity. Defendant AIG SunAmerica Life encouraged Plaintiff and the Class to rely on this proffered special knowledge and expertise in purchasing its variable annuities. Defendant AIG SunAmerica Life counseled Plaintiff and the Class concerning the specialized insurance investments they were purchasing; and

(f) Defendant AIG SunAmerica Life knew or should have known that Plaintiff and Class were unsophisticated investors, ill-equipped to understand the unfamiliar and technical language of the Polaris II variable annuity sold by Defendant AIG SunAmerica Life.

64. Based on the foregoing, Defendant AIG SunAmerica Life owed Plaintiff and the Class fiduciary duties, including a duty of good faith and fair dealing, a duty of full disclosure, and a duty of care arising out of its relationship with Plaintiff and the Class.

65. Defendant AIG SunAmerica Life had a duty to provide complete and truthful information to Plaintiff and the Class regarding the dilution of long term contract holders' holdings due to its failure to use current market values when using mutual funds share prices to value its sub-accounts and setting their daily AUV's and the market timing activities of certain favored investors.

66. By engaging in the conduct alleged herein, Defendant AIG SunAmerica Life breached its fiduciary duties to Plaintiff and the Class.

67. In addition to its fiduciary duties, Defendant AIG SunAmerica Life had an independent duty to disclose to Plaintiff and the Class the recurring dilution of long term contract holders' holdings due to its failure to use current market values when using mutual funds share prices to value its sub-accounts and setting their daily AUV's and the market timing activities of certain favored investors.

68. As a direct and proximate result of the Defendant AIG SunAmerica Life's breach of fiduciary duty, Plaintiff and the Class have been irreparably harmed and are entitled to compensatory damages in an amount to be proven at trial.

COUNT V

(Declaratory and Injunctive Relief)

69. Plaintiff repeats and incorporates by reference paragraphs 1 through 68 as if fully set forth herein.

70. Defendant AIG SunAmerica Life continues to permit the dilution of long term contract holders' holdings due to its failure to use current market values when using mutual funds share prices to value its sub-accounts and setting their daily AUV's and the market timing activities of certain favored investors..

71. Plaintiff, individually and on behalf of the Class, seeks a judgment declaring that Defendant AIG SunAmerica Life is in violation of the Alliance Global Equities sub-account's policies and procedures.

72. Plaintiff, individually and on behalf of the Class, seeks injunctive relief enjoining Defendant AIG SunAmerica Life from continuing to permit the dilution of long term contract holders' holdings due to its failure to use current market values when using mutual funds share prices to value its sub-accounts and setting their daily AUV's and the market timing activities of certain favored investors; requiring Defendant AIG SunAmerica Life to disgorge all ill-gotten profits realized from the activities of the market timers; and requiring Defendant AIG SunAmerica Life to provide full restitution of all wrongfully acquired monies to Plaintiff and the Class.

73. Plaintiff and the Class have no adequate remedy at law.

74. By reason of the foregoing, Plaintiff and the Class have been and continue to be irreparably harmed and are entitled to declaratory and injunctive relief as set forth above.

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Cause No. 1:05-CV-01086-JFM

PAULA BEALS, individually and on behalf of all others similarly situated
Plaintiff,

v.

THE VARIABLE ANNUITY LIFE INSURANCE COMPANY
Defendant.

[Filed June 24, 2006]

FIRST AMENDED COMPLAINT

* * * * *

VALIC'S VARIABLE ANNUITY FUNDS

6. People invest in variable annuities for the same reasons people invest in mutual funds: their investment is pooled with those of thousands of other investors thereby achieving economies of scale that investors could not otherwise enjoy individually. For instance, investors can be collectively invested in

a far more richly diversified portfolio of securities than they would be able to invest in individually; collectively they enjoy the benefits of professional management of their funds (such as investment research and daily monitoring of markets and securities) for a miniscule fraction of the cost they would pay individually because the costs are spread among thousands of investors; and, because large blocks of securities are traded on behalf of thousands of investors, trading transactional costs are vastly reduced because the transactional costs for the single "collective investor" are also spread among the thousands of actual investors invested in the fund. In addition, investors in variable annuities enjoy tax deferment on their investment, as well as a death benefit.

7. The VALIC annuities which are the subject of this Complaint consist of a "separate account" in which VALIC keeps investors' assets separate from VALIC's own assets.

8. Investors' funds in the separate account are the property of the investors and not the property of VALIC.

9. Each annuity's separate account is further divided into multiple sub-accounts, each of which corresponds to a single mutual fund.

10. Investors' funds in the sub-accounts are the property of the investors and not the property of VALIC.

11. VALIC invests the investors' funds in each sub-account in that sub-account's corresponding mutual fund. These mutual funds are maintained exclusively for variable annuity or variable life

insurance products, although they often bear names very similar to those of retail mutual funds.

12. Because the funds in the sub-accounts are investors' funds, when VALIC invests those funds in a mutual fund, the investors are the real owners of the shares of the mutual fund which VALIC only nominally holds in its name on behalf of and for the benefit of the investors.

13. VALIC credits each investor with "units" of the sub-accounts in which the investor's funds are invested.

14. Units in VALIC's sub-accounts can be traded, either by purchase or redemption, only once per day at 4:00 p.m. Eastern Time.

15. VALIC establishes a new daily "unit value" (UV) for each sub-account once every trading day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time.

16. At the end of each trading day, VALIC (either directly or through a fund manager) valuates the assets in each mutual fund and establishes a "net asset value" for each mutual fund. That net asset value is the same net asset value VALIC uses to establish the corresponding sub-account's daily UV.

17. The two factors which have the largest influence on the UV are the value of the mutual fund portfolio and the total number of investors invested in that mutual fund (i.e., the total number of investors who hold units in the sub-account which corresponds to any given mutual fund).

18. Because the sub-accounts' UV's are based upon the per share value of the underlying

mutual fund, the value of an investor's sub-account units will fluctuate as the value of the corresponding mutual fund fluctuates.

19. VALIC contracts with fund managers who manage the mutual funds in which VALIC invests sub-account funds.

20. The fund managers handle the day-to-day tasks associated with managing an investment portfolio, such as investment management and valuation of the mutual fund's underlying portfolio of securities.

VALIC'S SUB-ACCOUNTS' CORRESPONDING MUTUAL FUNDS' PORTFOLIOS INCLUDE FOREIGN SECURITIES

21. Some of the mutual funds in which the annuity sub-accounts are invested include in their portfolios securities which are traded in markets outside of the United States.

22. In valuing the assets of a mutual fund, the fund manager uses the last trade price in the home market of each of the securities in its portfolio. The home markets for the foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and/or Sydney. These markets are located in time zones that are five to fifteen hours ahead of Eastern Time.

23. Thus, a five to fifteen hour interval elapses between the close of the foreign securities markets and VALIC's calculation of its sub-accounts' UV's.

24. For example, the exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of

securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When VALIC or its fund managers calculate the value of the mutual funds' portfolios, it uses any Japanese securities' closing prices in the Tokyo exchange. Thus, when VALIC calculates its sub-accounts UV's based upon the mutual fund valuation, VALIC necessarily incorporates the closing prices on the Tokyo exchange for any Japanese securities, closing prices that have been static for 14 hours.

25. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the U.S. markets and value movements in foreign markets. If the U.S. markets experience an upward movement in values, it can be predicted that foreign markets will move upward once trading begins the next day. Similarly, if the U.S. markets experience a downward movement in values, it can be predicted that foreign markets will move downward once trading begins the next day.

26. Studies also demonstrate that the greater the percentage increase or decrease in the value of U.S. markets, the more likely foreign markets will post corresponding value movements on the subsequent trading day. The probability that the value movements of foreign markets will follow the previous day's value movements in U.S. markets is directly correlated to the degree or extent of the value movement of U.S. markets.

VALIC'S MISMANAGEMENT EXPOSES INVESTORS TO MARKET TIMING

27. A significant portion of the underlying securities in the mutual fund portfolios associated with the VALIC sub-accounts are listed on foreign exchanges and trade during each market's respective session.

28. When VALIC or its fund managers establish the share values of the mutual funds in which VALIC invests the sub-accounts' funds, they do not take into account on a daily basis any price relevant information (such as such as value movements in the U.S. markets, changes in world equity market indices, changes in the value of American Depository Receipts (ADRs), and fluctuations in foreign currency futures markets) that has become available in the interval between the close of the foreign markets and the calculation of the mutual funds' share values.

29. Such price relevant information is significant because the final market prices of the foreign securities often have become stale because they no longer reflect the current market value of the securities.

30. When the foreign securities prices are stale, VALIC's (or its fund managers') use of such stale prices of the foreign securities to calculate the UV causes the UV to be either artificially high or artificially low.

31. VALIC's calculation of artificially high or artificially low UV's exposed existing sub-account holders to market timing traders who regularly

purchase and redeem units of VALIC's sub-accounts as part of a profitable, stale-price trading strategy.

32. Market timing is a short-term trading strategy by which the market timing trader takes advantage of the artificially low or high UV's. Because VALIC uses stale pricing of foreign securities to calculate mutual fund share values and thus sub-account UV's, market timers are able to predict changes in the UV's based on events that occur after the close of foreign securities markets but before the U.S. markets close.

33. Market timers buy units of VALIC sub-accounts on days when the U.S. markets move up, and they redeem units when the U.S. markets move down.

34. Due to VALIC's use of stale pricing, anyone who buys VALIC's sub-account units on days when the U.S. markets move up are buying units whose prices are artificially low, irrespective of whether the purchaser intends to market time. Similarly, anyone who redeems VALIC's sub-account units on days when the U.S. markets move down are redeeming units whose prices are artificially high, irrespective of whether the purchaser intends to market time.

VALIC'S FAILURE TO PROHIBIT MARKET TIMING DILUTES HOLDERS' OWNERSHIP INTERESTS

35. Every purchase of VALIC sub-account units at an artificially low UV dilutes the ownership interests of all existing sub-account holders because the purchaser acquires a larger percentage of ownership interest of the sub-account than the

purchaser would have acquired had VALIC not used stale prices of foreign securities to calculate the UV.

36. Similarly, every redemption of VALIC sub-account units at an artificially high UV dilutes the ownership interests of all other existing sub-account holders because the redeemer depletes subaccount assets more than they would have been depleted had VALIC not used stale prices of foreign securities to calculate the UV.

37. VALIC's use of stale prices of foreign securities to calculate the UV does not, in and of itself, injure sub-account holders. Indeed, VALIC's methodology for calculating the UV could, at least theoretically, sometimes benefit holders to the extent that someone purchases units at an artificially high UV or someone redeems units at an artificially low UV. Moreover, if no trading occurs on a day when the UV is artificially high or artificially low, holders are not injured.

38. Thus, it is VALIC's failure to prohibit purchases of sub-account units at an artificially low UV and redemptions of sub-account units at an artificially high UV which injures existing holders of subaccount units.

39. The wealth represented by market timing dilution comes exclusively and dollar-for-dollar out of the pockets of existing holders of sub-account units.

PLAINTIFF AND CLASS MEMBERS HAVE NO FEDERAL SECURITIES LAW CLAIM

40. Stale price trading in VALIC annuity sub-accounts does not materially benefit VALIC, its directors, officers or employees.

41. With respect to market timing or stale price trading in its annuities' sub-accounts, VALIC did not make any untrue statement or fail to disclose any material fact in connection with Plaintiff's or class members' purchases or sales of such annuities or purchases or sales of units in VALIC's annuities' sub-accounts.

42. With respect to market timing or stale price trading in its annuities' sub-accounts, VALIC did not use or employ any manipulative or deceptive device or contrivance in connection with Plaintiff's or class members' purchases or sales of such annuities or purchases or sales of units in VALIC's annuities' sub-accounts.

43. No purchaser of VALIC's sub-account units is injured, in connection with his purchase, by any other purchaser's purchase of sub-account units at an artificially low UV.

44. No purchaser of VALIC's sub-account units is injured, in connection with his purchase, by any other trader's redemption of sub-account units at an artificially high UV.

45. No seller of VALIC's sub-account units is injured, in connection with the redemption of his sub-account units, by a purchaser's purchase of sub-account units at an artificially low UV.

46. No seller of VALIC's sub-account units is injured, in connection with the redemption of his sub-account units, by any other trader's redemption of sub-account units at an artificially high UV.

47. As a result, stale price trading does not injure purchasers or sellers of VALIC's sub-account units.

48. Accordingly, because VALIC, with respect to market timing or stale price trading in its annuities' sub-accounts, did not make an untrue statement, fail to disclose any material fact or use or employ any manipulative or deceptive device or contrivance in connection with Plaintiff's or class members' purchases or sales of such annuities or purchases or sales of units in VALIC's annuities' sub-accounts Plaintiff and class members have no cause of action under federal securities law.

STALE PRICE TRADING DOES NOT INJURE VALIC AND IS THEREFORE NOT A SHAREHOLDERS' DERIVATIVE CLAIM

49. Market timing and stale price trading dilutes the value of investors' pooled investment in VALIC sub-accounts which, as alleged above, are the separate property of the investors and not the property of VALIC.

50. Market timing and stale price trading does not injure VALIC or its property.

51. As a result, the dilution that occurs through market timing and stale price trading injures shareholders directly.

52. Accordingly, Plaintiff brings this suit for mismanagement against VALIC as a direct action and not as a shareholders' derivative action.

CLASS ACTION ALLEGATIONS

53. Through her ownership of the VALIC Tax-Sheltered Annuity, Plaintiff at all times relevant to this Complaint held units in the Putnam Global Equities Variable Investment Option sub-account for the purpose of long-term investment.

54. Plaintiff brings this class action on behalf of herself and on behalf of a class of all persons in the United States who held (through their ownership of an VALIC annuity or insurance products) units of any VALIC sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing or stale price trading activity.

i. Excluded from the class are VALIC and any of its parent, subsidiary or affiliated corporations, as well as any of their controlled persons, officers, directors, agents, servants or employees, and the immediate family members of any such person; any judge who may preside over this case; all persons who have claims in excess of $75,000; and any investor who engaged in market timing trading in the VALIC subaccounts which are the subject of this Complaint.

ii. Excluded from this Complaint are any claims Plaintiff or any class member may have based upon VALIC's conduct in connection with Plaintiff's or any

class member's purchase or sale of any VALIC annuity or insurance products.

55. Alternatively, if VALIC is found, with respect to market timing or stale price trading in its annuities' sub-accounts, to have made any untrue statement, failed to disclose any material fact, or used or employed any manipulative or deceptive device or contrivance, Plaintiff brings this class action on behalf of herself and on behalf of a class of all persons in the United States who, prior to VALIC's untrue statement, omission of material fact, use or employment of any manipulative or deceptive device or contrivance, held (through their ownership of an VALIC annuity or insurance products) units of any VALIC sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing trading activity.

i. Excluded from the class are VALIC and any of its parent, subsidiary or affiliated corporations, as well as any of their controlled persons, officers, directors, agents, servants or employees, and the immediate family members of any such person; any judge who may preside over this case; all persons who have claims in excess of $75,000; and any investor who engaged in market timing trading in the VALIC subaccounts which are the subject of this Complaint.

ii. Excluded from this Complaint are any claims Plaintiff or any class member may have with respect to any purchase or sale of any VALIC annuity or

insurance products after VALIC's untrue statement, omission of material fact, or use or employment of any manipulative or deceptive device or contrivance.

iii. Also excluded from the class is any person whose only purchases of any VALIC annuity or insurance products all occurred after VALIC's untrue statement, omission of material fact, or use or employment of any manipulative or deceptive device or contrivance.

iv. Also excluded from this Complaint are any other claims Plaintiff or any class member may have based upon VALIC's conduct in connection with Plaintiff's or any class member's purchase or sale of any VALIC annuity or insurance products.

56. Plaintiff is a member of the class and will fairly and adequately assert and protect the interests of the class. Plaintiff's interests are coincident with, and not antagonistic to, those of other class members.

57. Plaintiff has retained attorneys who are experienced in class action litigation.

58. Members of the class are so numerous and geographically dispersed that joinder of all members is impracticable. While Plaintiff cannot ascertain the exact number and identity of class members prior to discovery, on information and belief, there are thousands of class members and

their identity can be ascertained from VALIC's books and records.

59. There are questions of law or fact common to the class, and Plaintiff's claims are typical of those of class members.

60. Those common questions predominate over any questions affecting only individual members of the class.

61. Those predominating, common questions include, but are not limited to, the following:

i. whether in calculating daily UV's VALIC negligently failed to evaluate on a daily basis price relevant information available after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the calculation of the daily UV, which was likely to change the value of the mutual fund securities and thus sub-account UV's;

ii. whether in calculating daily UV's VALIC negligently failed to implement valuation and pricing policies and procedures which would account for price relevant events occurring after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the calculation of the daily UV, whenever closing prices of mutual fund portfolio securities did not reflect their current market values;

iii. whether VALIC negligently failed to protect its sub-account holders from market timing or stale price trading;

iv. whether Plaintiff and the class have sustained damages as a result of VALIC's negligence; and/or

v. the proper measure of any such damages.

62. The prosecution of separate actions by individual members of the class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the class; and/or

ii. adjudication with the respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protest their interest.

63. The class action method is appropriate for the fair and efficient prosecution of this action.

64. Individual litigation of all claims, which might be brought by all class members, would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides a manageable means of bringing to rapid conclusion the claims of all persons with whom Plaintiff is similarly situated with respect to VALIC's negligence as alleged herein.

COUNT I
(COMMON LAW NEGLIGENCE)

65. Plaintiff repeats and incorporates by reference paragraphs 1 through 64 as if fully set forth here.

66. As a specialist in the field of investment management, it became VALIC's duty to exercise that degree of knowledge, skill and care ordinarily used, or which should be used, by reasonably well qualified members of the investment management profession, including but not limited to the duties:

i. to use mutual fund share values predicated upon current market values when valuing sub-accounts and setting their daily UV's; and/or

ii. to prevent market timing and/or stale price trading in sub-accounts to prevent the dilution of the ownership interests of existing sub-account holders.

67. VALIC knew or should have known that the closing prices for the foreign securities held in its sub-accounts' corresponding mutual funds' portfolios did not represent current market values of those foreign securities whenever price relevant events had occurred after the closing of foreign securities markets but before VALIC's calculation of daily UV's.

68. VALIC was negligent in one or more of the following ways:

i. failing to evaluate on a daily basis price relevant information available to VALIC after the close of foreign

securities markets in which the underlying mutual funds' portfolios of securities traded;

ii. failing to adjust calculation of daily UV's to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before VALIC's calculation of daily UV's; and/or

iii. failing to implement policies and procedures which would protect sub-account holders such as Plaintiff and class members from the dilution effect of market timing and/or stale price trading.

69. As a direct and proximate result of VALIC's negligence, Plaintiff and the class have suffered damages in an amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages and costs.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause Nos. 03-L-1255 (Consolidated with 03-L-1539 and 03-L-1540 for argument.)

CARL KIRCHER and ROBERT BROCKWAY, individually and on behalf Of all others similarly situated,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, ET AL.
Defendants

[Dec. 20, 2007]

Before: Circuit Court Judge Barbara Crowder

Order

This cause came before the Court for argument in combination with two other actions assigned to the undersigned. The court took the matter under advisement to review the voluminous pleadings and the submissions of all counsel.

This action was initially removed to federal court and recently remanded back to this court. The Court has reviewed the Supreme Court's Order in

Kircher v. Putnam Funds Trust, 126 S Ct. 2145 (2006).

Defendants' motion for judgment on the pleadings tests the complaint on its face and can be granted only if the defendant is entitled to judgment as a matter of law. The action is a putative class action. The court's analysis will deal with whether SLUSA (Securities Litigation Uniform Standards Act) pre-empts the state law claims as a putative class action noting that certification of a class has not been granted. While this Court has read the decision of the federal court that remanded these cases back to state court, that decision does not control this outcome. This court is required to review the issue of SLUSA preclusion and may of course review and consider the analysis from other courts in making its determination. The undersigned notes that the federal decision makes several presumptions about the evidence that would be presented and how it would differ from what the plaintiffs argue they expect it to be. If the analysis of the federal court as to content of plaintiffs' evidence and the emphasis of its presentation turns out to be prophetic, the complaint would indeed run afoul of SLUSA. However, these motions are for judgment on the pleadings and this court is held to what is in the pleadings rather than any alleged ability to foretell what may be presented as evidence in the face of both sides disagreeing as to what the evidence will be. The court is well aware that "artful pleading" by the use of terms found in any thesaurus that actually mean fraud and misrepresentation will not allow plaintiffs to avoid defendants' motion for judgment on the pleadings.

If the only way plaintiffs can prevail on their claims is to prove an untrue statement, misrepresentation, omission of a material fact or manipulation of facts, defendants prevail. (15 USC sec. 77(p) (b)). Plaintiffs' position is that the claims in the complaint concern mishandling and not misrepresentation and they will not use such proof.

SLUSA requires dismissal only where all the elements exist: a covered class action based on a state law alleging misrepresentation or deceptive practice in connection with a sale or purchase of a covered security.

In essence, these actions deal with allegations of negligence or recklessness based on market timing in international funds. Plaintiffs fault defendants for ignoring or not knowing that calculating the net asset value (NAV) of foreign securities using the New York Stock Exchange closing time fails to take into account what happens in foreign trading markets in different time zones. Plaintiffs claim is that the funds' failure to adjust when trading is allowed leaves their fund owners vulnerable. Savvy market-timer traders are allowed by defendants to buy or sell by taking the foreign markets into account which adversely affects the value of funds owned by the plaintiffs. Investors place orders for the mutual funds shares then the NAV is calculated after the close of the New York Stock Exchange and then trade orders are executed after the NAV is set at the new price. The complaint can be read to challenge the way the funds are handled without alleging the fund managers are misrepresenting or manipulating the values. The court does not find that factual recitations of what defendants' state in a prospectus

necessarily implies that plaintiff means the recitations are false. If plaintiffs head down that road, the court would certainly expect to receive a motion and will rule accordingly.

The motions cannot be granted as a judgment on the pleadings under 735 ILCS 5/2-615(e). The Motions are denied.

Clerk to send copies.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1255

CARL KIRCHER and ROBERT BROCKWAY, individually and on behalf Of all others similarly situated,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, PUTNAM INVESTMENT MANAGEMENT, LLC EVERGREEN INTERNATIONAL TRUST and EVERGREEN INVESTMENT MANAGEMENT COPMANY, LLC
Defendants

[May 2, 2008]

Before: Circuit Court Judge Barbara Crowder

Order

This cause came before the Court on Defendants' Motion For Rule 308 Certification. The three actions argued together are by holders of mutual funds seeking to be class representatives on state law claims concerning market timing. The

Court denied a Motion for Judgment on the pleadings.

The question of law involved in this complaint involves the scope of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C. sec. 77p(b)(l), 78bb(f)(l). There is substantial ground for difference of opinion on whether SLUSA precludes state law claims of negligence or recklessness. The federal order that remanded this action back to state court believed the scope of SLUSA to be broad enough that it precludes the claims raised in the complaint; this court did not. Myriad cases discuss holder claims and the outlook on misrepresentation and deception with different views.

An immediate appeal from the court order denying the motion for judgment on the pleadings may materially advance the completion of the litigation; if SLUSA precludes these claims the litigation is over.

The Court therefore grants the motion for Rule 308 certification and certifies the following questions for consideration by the Appellate Court:

1. Does the Securities Litigation Uniform Standards Act of 1998 preclude this action?

2. Does the Securities Litigation Uniform Standards Act of 1998 preclude a holder of mutual funds from pursuing a putative class action for negligent management of funds in state court?

3. Does the Securities Litigation Uniform Standards Act of 1998 preclude a holder of mutual funds from pursuing a putative class action for

reckless (or willful and wanton) management of funds in state court?

4. Does the Securities Litigation Uniform Standards Ad of 1998 preclude a state law claim for negligent failure to prevent market timing?

5. Does the Securities Litigation Uniform Standards Act of 1998 preclude a state law claim for reckless (or willful and wanton) failure to prevent market timing?

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Cause No. 5-08-0260

CARL KIRCHER and ROBERT BROCKWAY, individually and on behalf Of all others similarly situated,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, PUTNAM INVESTMENT MANAGEMENT, LLC EVERGREEN INTERNATIONAL TRUST and EVERGREEN INVESTMENT MANAGEMENT COPMANY, LLC
Defendants

Appeal from the Circuit Court
of Madison County, Ill.

No. 03-L-1255

[June 10, 2008]

Order

This cause coming to be heard on defendants' application for leave to appeal pursuant to Supreme Court Rule 308, plaintiffs' answer thereto and the court being advised in the premises:

IT IS THEREFORE ORDERED that defendants' application for leave to appeal pursuant to Supreme Court Rule 308 is hereby GRANTED.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. § 77p provides:

§77p. Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b) of this section, the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c) of this section, a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves –

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c) of this section, a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office per-forming like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to re-cover damages on a representative basis on be-half of themselves and other unnamed parties similarly situated, and questions of

law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, in-vestment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive con-duct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

125a 15 U.S.C. § 78bb provides:

§ 78bb. Effect on existing law

(a) Addition of rights and remedies; recovery of actual damages; State securities commissions

Except as provided in subsection (f) of this section, the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Except as otherwise specifically provided in this chapter, nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate any put, call, straddle, option, privilege, or other security subject to this chapter, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such security. No provision of State law regarding the offer, sale, or distribution of securities shall apply to any transaction in a security futures product, except that this sentence shall not be construed as limiting any State antifraud law of general applicability.

(b) Modification of disciplinary procedures

Nothing in this chapter shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or participants, (2) on any municipal securities dealer or municipal securities broker of any action taken pursuant to a procedure established by the Municipal Securities Rulemaking Board to settle disputes between municipal securities dealers and municipal securities brokers, or (3) of any action described in paragraph (1) or (2) on any person who has agreed to be bound thereby.

(c) Continuing validity of disciplinary sanctions

The stay, setting aside, or modification pursuant to section 78s(e) of this title of any disciplinary sanction imposed by a self-regulatory organization on a member thereof, person associated with a member, or participant therein, shall not affect the validity or force of any action taken as a result of such sanction by the self-regulatory organization prior to such stay, setting aside, or modification: *Provided*, That such action is not inconsistent with the provisions of this chapter or the rules or regulations thereunder. The rights of any person acting in good faith which arise out of any such action shall not be affected in any way by such stay, setting aside, or modification.

(d) Physical location of facilities of registered clearing agencies or registered transfer agents not to subject changes in beneficial

or record ownership of securities to State or local taxes

No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision. No State or political subdivision thereof shall impose any tax on securities which are de-posited in or retained by a registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor, unless such securities would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political sub-division.

(e) Exchange, broker, and dealer commissions; brokerage and research services

(1) No person using the mails, or any means or instrumentality of interstate commerce, in the exercise of in-vestment discretion with respect to an account shall be deemed to have acted unlawfully or to have breached a fiduciary duty under State or

Federal law unless expressly provided to the contrary by a law enacted by the Congress or any State subsequent to June 4, 1975, solely by reason of his having caused the account to pay a member of an exchange, broker, or dealer an amount of commission for effecting a securities transaction in excess of the amount of commission another member of an ex-change, broker, or dealer would have charged for effecting that transaction, if such person determined in good faith that such amount of commission was reasonable in relation to the value of the brokerage and research services provided by such member, broker, or dealer, viewed in terms of either that particular transaction or his overall responsibilities with respect to the accounts as to which he exercises investment discretion. This subsection is exclusive and plenary insofar as conduct is covered by the foregoing, unless otherwise expressly provided by contract: *Provided*, however, that nothing in this subsection shall be construed to impair or limit the power of the Commission under any other provision of this chapter or otherwise.

(2) A person exercising investment discretion with respect to an account shall make such disclosure of his policies and practices with respect to commissions that will be paid for effecting securities transactions, at such times and in such manner, as the appropriate regulatory agency, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) For purposes of this subsection a person provides brokerage and research services insofar as he –

(A) furnishes advice, either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing, or selling securities, and the availability of securities or purchasers or sellers of securities;

(B) furnishes analyses and reports concerning issuers, industries, securities, economic factors and trends, port-folio strategy, and the performance of accounts; or

(C) effects securities transactions and performs functions incidental thereto (such as clearance, settlement, and custody) or required in connection therewith by rules of the Commission or a self-regulatory organization of which such person is a member or person associated with a member or in which such person is a participant.

(4) The provisions of this subsection shall not apply with regard to securities that are security futures products.

(f) Limitations on remedies

(1) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging 129a

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in

connection with the purchase or sale of a covered security.

(2) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

(3) Preservation of certain actions

(A) Actions under State law of State of incorporation

(i) Actions preserved

Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this sub-paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(ii) Permissible actions

A covered class action is described in this clause if it involves –

(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that –

(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(B) State actions

(i) In general

Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(ii) State pension plan defined

For purposes of this subparagraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of a State or political subdivision thereof, or by any agency or instrumentality thereof.

(C) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual

agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(D) Remand of removed actions

In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(4) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(5) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(B) Covered class action

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact

common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on be-half of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(C) Exception for derivative actions

Notwithstanding subparagraph (B), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(D) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only

if the entity is not established for the purpose of participating in the action.

(E) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933 [15 U.S.C. 77r(b)], at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 [15 U.S.C. 77a et seq.] pursuant to rules issued by the Commission under section 4(2) of that Act [15 U.S.C. 77d(2)].

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

Supreme Court, U.S.
FILED
AUG 10 2009
OFFICE OF THE CLERK

No. 08-1340

IN THE

Supreme Court of the United States

MATTHEW WIGGENHORN, *ET AL.*,

Petitioners,

v.

AXA EQUITABLE LIFE INSURANCE COMPANY, *ET AL.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

After the defendants removed petitioners' state-law class-action securities complaints alleging deception, misrepresentation, and omission of material facts to federal court under the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, petitioners amended their complaints. The amended complaints retained the same factual allegations, but generally deleted the express claims of misrepresentation or material omission. The question presented is:

Whether the court of appeals erred in summarily affirming the district court's conclusion, consistent with the uniformly applied artful pleading rule, that the complaints sought relief on grounds precluded by the Securities Litigation Uniform Standards Act, 15 U.S.C. §§ 77p(b) & 78bb(f)(1)(A).

RULE 29.6 DISCLOSURE

AXA Equitable Life Insurance Company is a wholly owned subsidiary of AXA Financial, Inc., which, in turn, is wholly owned by AXA, S.A. Other than AXA, S.A., no publicly held company owns 10% or more of the stock of AXA Equitable Life Insurance Company.

Nationwide Financial Services, Inc. is the parent corporation of Nationwide Life Insurance Company. In turn, Nationwide Corporation is the parent corporation of Nationwide Financial Services, Inc., and Nationwide Mutual Insurance Company is the parent corporation of Nationwide Corporation. No publicly held company owns 10% or more of the stock of Nationwide Life Insurance Company.

The Variable Annuity Life Insurance Company is a wholly owned subsidiary of American General Life Insurance Company, which itself is a wholly owned subsidiary of AGC Life Insurance Company, which, in turn, is a wholly owned subsidiary of AIG Life Holdings (US), Inc., which is a wholly owned subsidiary of American International Group, Inc. Other than American International Group, Inc., no other publicly held company owns 10% or more of the stock of The Variable Annuity Life Insurance Company.

The parent corporations of AIG SunAmerica Life Assurance Company are SunAmerica Life Insurance Company, AIG Retirement Services, Inc.,

and American International Group, Inc. Other than American International Group, Inc., no other publicly held company owns 10% or more of the stock of AIG SunAmerica Life Assurance Company.

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STATEMENT

1. Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, as part of a broader effort to promote uniformity in securities litigation and to curb abusive litigation. SLUSA reinforced the limitations on securities actions imposed three years earlier in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 77z-1, 78u, by preventing plaintiffs from using state-court actions to avoid the PSLRA's heightened pleading requirement and other limitations. *See generally Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006).[1]

To that end, SLUSA makes federal courts the exclusive venue for most class actions alleging misrepresentations or material omissions in connection with the purchase or sale of "covered securities," 15 U.S.C. §§ 77p(f)(3), 78bb(f)(5)(E), and mandates that such actions be governed exclusively by federal securities law. More specifically, SLUSA provides that:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

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[1] The decline in federal securities class actions that occurred after the passage of the PSLRA was accompanied by a nearly identical increase in state court filings. *See* H.R. Conf. Rep. No. 803, 105th Cong., 2d Sess. 14 (1998).

> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b) (amendment to the Securities Act of 1933, 48 Stat. 74); *accord* 15 U.S.C. § 78bb(f)(1)(A) (amendment to the Securities Exchange Act of 1934, 48 Stat. 881).[2]

SLUSA further authorizes defendants to remove covered class actions to federal court and then enforce SLUSA's preclusion provision through dismissal. 15 U.S.C. § 77p(c) ("Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district court in which the action is pending, and shall be subject to paragraph (1)['s]" bar); *see* 15 U.S.C. § 78bb(f)(2) (same).

2. Petitioners are individuals who purchased variable annuities from the defendant life insurance companies, AXA Equitable Life Insurance Company, The Variable Annuity Life Insurance Company, Nationwide Life Insurance Company, and AIG SunAmerica Life Assurance Company (collectively, "Companies"). Variable annuities are insurance products that are also deemed to be securities

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[2] A "covered class action" under SLUSA is a class action in which damages are sought under state law on behalf of more than 50 people. 15 U.S.C. § 77p(f)(2)(A); *see* 15 U.S.C. § 78bb(f)(5)(B); *see generally Dabit*, 547 U.S. at 83 & n.8.

because they offer purchasers a choice of investment options through "subaccounts." The Companies offered a range of subaccounts that invested in mutual funds with different investment strategies, including some mutual funds that invested in foreign securities. Pet. App. 3a.

The claims in this case arise from a practice known as "market timing." Most mutual funds calculate their net asset value per share ("net value") once per day – at the New York Stock Exchange's 4:00 p.m. close. Foreign securities are also priced at that time based on their last closing price on foreign exchanges. The prices of foreign securities thus may be several hours old by the time the mutual fund's net value is calculated. If market circumstances have changed in the interim, the prices used to calculate the net value of mutual funds holding foreign securities may be "stale," in that they could either over- or understate those foreign securities' value. *See* Pet. App. 9a n.3; *In re Mutual Funds Investment Litigation*, 437 F. Supp. 2d 439, 440 n.1 (D. Md. 2006). For example, "if U.S. stocks rally after the international markets have closed for the day, the value of the international securities on that day will not reflect the rise in the U.S. market.'" Pet. App. 9a n.3 (quoting Roberto M. Braceras, *Late Trading and Market Timing*, 37 Rev. Sec. & Commodities Reg. 61, 64 (April, 14, 2004)).

Petitioners allege that market-timing traders took advantage of the arbitrage opportunity created by stale pricing by buying or selling shares of a subaccount, depending on whether they believed those securities were undervalued or overvalued, and then quickly selling or buying the shares once the

market prices adjusted. Petitioners further allege that this "market timing" activity diluted the value of the investments held by other annuity owners who invested for the long-term and did not engage in short-term trading. Pet. App. 13a.

3. Petitioners filed multiple complaints in Illinois state court seeking certification of a class consisting of all variable annuity policyholders who had invested through their subaccounts in mutual funds containing foreign securities and who had not engaged in market timing. Pet. App. 8a-9a. The "materially indistinguishable" complaints (Pet. App. 9a) alleged that each of the Companies acted negligently and/or recklessly by relying upon allegedly stale prices in calculating the value of policyholders' investments. Pet. App. 4a. Petitioner Mehta specifically alleged that the pricing practices were "fraudulent" and "likely to deceive." C.A. J.A. 63. All of the complaints alleged that the Companies deceived policyholders by failing to inform them of the potential for market timing and the harm it could entail. *See id.* at 61, 95, 128, 239.

The Companies removed their respective actions to the United States District Court for the Southern District of Illinois and then moved to dismiss the complaints on the ground that the claims were precluded by SLUSA. Pet. App. 14a.[3] Before the court ruled on the motions, however, the Judicial Panel for Multidistrict Litigation transferred the actions to the United States District Court for the District of Maryland. *Ibid.*

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[3] AIG SunAmerica Life Assurance Company moved for judgment on the pleadings rather than to dismiss. Pet. 10.

After the cases were transferred, each of the petitioners amended their complaints, but petitioner Mehta later moved to withdraw her amended complaint because AIG SunAmerica Life Assurance Company had already answered the original complaint and moved for judgment on the pleadings. C.A. J.A. 500. The amended complaints continued to allege that the Companies were responsible for mispricing shares in the underlying mutual funds and valuing the corresponding subaccounts at levels that were "artificially high" or "artificially low." *See, e.g.*, C.A. J.A. 284, 302, 315, 519. At the same time, petitioners eliminated any explicit mention of deception or misrepresentation in their complaints, alleging instead that the Companies had acted negligently by failing both to price the subaccounts properly and to otherwise protect policyholders from market timing. Pet. App. 14a.[4]

AXA Equitable, Variable, and Nationwide moved to dismiss the amended complaints as, *inter alia*, precluded by SLUSA, Pet. App. 14a, while AIG's original motion for judgment on the pleadings sought dismissal on the same grounds, Pet. 12 n.8.

The district court granted the Companies' motions to dismiss. Pet. App. 8a-18a. Explaining that SLUSA precludes an action that "alleges a misrepresentation concerning the value of the securities sold or the consideration received in return," the district court found that "[t]hat is exactly what the plaintiffs have done here, despite their

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[4] Because petitioner Mehta moved to withdraw her amended complaint, her operative pleading remains her original complaint, which explicitly alleges fraud and deception.

emphatic disavowal of their prior explicit allegations of misrepresentation, and their pared-down amended complaint." Pet. App. 16a (quoting *Araujo v. John Hancock Life Ins. Co.*, 206 F. Supp. 2d 377, 382 (E.D.N.Y. 2002)). The court explained that, "at bottom," Pet. App. 16a, the petitioners' complaints involved "a misrepresentation or omission of a material fact in connection with the purchase or sale of a security," because they alleged that "the defendants incorrectly priced certain investment options," *id.* at 15a (citing 15 U.S.C. § 78bb(f)(1)(A)).

The court further explained that "plaintiffs concede[d] as much in their opposition memoranda," because they argued that, "'to the extent that [the Companies] may be said to have 'misrepresented' the purchases or sales of the annuity's unit values, it * * * was in connection with the market timers' purchase and sales of annuity units.'" Pet. App. 16a n.10. The district court accordingly held that petitioners' "artful attempt at avoiding SLUSA preemption ultimately fails," and granted the Companies' motions to dismiss. *Id.* at 18a.

4. The court of appeals unanimously affirmed (Pet. App. 1a-7a) in an unpublished per curiam order "based substantially on the reasoning of the district court" (*id.* at 7a). Petitioners did not seek rehearing en banc.

ARGUMENT

The district court dismissed petitioners' complaints based on a record-bound analysis of petitioners' allegations and the distinctive procedural history of these cases. The court of appeals' unpublished affirmance of that decision comports with the rulings of this Court and every other court of

appeals to address the SLUSA-pleading question. Accordingly, this Court's review is not warranted.

1. The court of appeals' affirmance of the district court's decision hews to settled law preventing the use of "artful pleading" by plaintiffs to avoid preemption or preclusion of their claims. SLUSA adopts the same statutory standard for both removal and preclusion of a covered class action, focusing in both instances on what the "class action" is "alleging." *See* 15 U.S.C. § 77p(c); 15 U.S.C. § 78bb(f)(2). As a result, SLUSA serves both "as an express exception to the well-pleaded complaint rule," for removal purposes, and as a substantive bar to litigation the "preemptive force" of which "cannot be circumvented by artful drafting." *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 304 (3d Cir. 2005); *see U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 842 (9th Cir. 2007) (same).

The law in this Court is settled that "'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 22 (1983)). Consequently, "[i]f a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Ibid.*

Every court of appeals to address the question has held that the statutory test for SLUSA preclusion textually parallels that well-established "artful pleading" exception to the well-pleaded complaint rule, because preclusion under SLUSA (like the removal inquiry) turns on whether the class action

fairly alleges a statutorily precluded claim. *See Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1286 (10th Cir. 2008) ("[C]ourts have generally held that SLUSA precludes those claims" that "meet all of the elements of SLUSA" "regardless of how artfully or cleverly plaintiffs attempt to plead them."); *LaSala v. Bordier et Cie*, 519 F.3d 121, 128 (3d Cir.) (SLUSA bars claims that, "no matter how pleaded, in essence allege securities fraud"), *petition for cert. dismissed*, 129 S. Ct. 593 (2008); *Rowinski*, 398 F.3d at 304 (focus on what "reasonable reading of the complaint evidences"); *U.S. Mortgage*, 494 F.3d at 842 (SLUSA cannot be "circumvented by artful drafting"); *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 702 (5th Cir. 2004) (plaintiffs cannot "articulate pleadings that dodge SLUSA") (citing with approval *In re WorldCom, Inc. Securities Litigation*, 308 F. Supp. 2d 236, 244 (S.D.N.Y. 2004)); *Dudek v. Prudential Securities, Inc.*, 295 F.3d 875, 879 (8th Cir. 2002) (SLUSA preclusion cannot be avoided by "artfully concealing the federal question in an otherwise well-pleaded complaint under state law"); *id.* at 879 n.3 ("Congress combined preemption with removal of covered class actions to the federal courts.").

The court of appeals' unpublished decision in this case did nothing more than summarily affirm the district court's application, in the SLUSA preclusion context, of that settled artful-pleading principle to the facts and record in this case. *See* Pet. 13 (acknowledging that "the Fourth Circuit offered no new analysis"). The district court's determination that the claims were precluded turned upon (i) the litigation's unique and procedurally lengthy record, (ii) the timing and nature of the amendments to the

complaint, which evidenced a calculated effort to avoid SLUSA preclusion, and (iii) the fundamental character of the "negligence" claim as founded on the alleged misrepresentation of securities prices and/or the omission of material factual information. Pet. App. 16a-18a.

The district court explained, moreover, that its assessment was confirmed by petitioners' concession in their brief that their claim could be understood as alleging that the Companies "'misrepresented'" the annuities' values. Pet. App. 16a n.10 ("The plaintiffs concede as much in their opposition memoranda."). Based on that case-specific confluence of factors, the district court held that "the plaintiffs' artful attempt at avoiding SLUSA preemption ultimately fails." *Id* at 18a.

The court of appeals' unpublished affirmance of the district court's application in the SLUSA context of the well-settled "artful pleading" rule does not merit this Court's review. The ruling is record-bound, rested in part on the petitioners' own concession in briefing, Pet. App. 16a n.10, and does not establish any new law under the "artful pleading" doctrine or SLUSA. While petitioners may disagree with aspects of the district court's analysis, this Court does not exercise its certiorari jurisdiction to review claims of case-specific error correction.

2. a. The court of appeals' affirmance of the district court's decision comports with the ruling of every other circuit that has addressed the question.

The Seventh Circuit's vacated decision in *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (2005), *vacated*, 547 U.S. 633 (2006), held that plaintiffs could not avoid SLUSA preclusion by framing their complaints

to avoid any explicit allegations of a purchase or sale of securities. *Id.* at 483-484. Like the district court here, the Seventh Circuit reviewed the pleadings and determined that, in substance, "plaintiffs' claims depend on statements made or omitted in connection with *their own* purchases of the funds' securities." *Id.* at 484. The court accordingly held that the claims were precluded.[5]

The Eighth Circuit likewise looks beyond the explicit allegations of the plaintiff's complaint and examines the necessary substance of the claims. Like petitioners here, the plaintiffs in *Dudek* initially filed a complaint alleging misrepresentation and deceit, but later amended their complaint to exclude any explicit reference to those allegations. 295 F.3d at 879. And like the district court decision affirmed by the Fourth Circuit in this case, *Dudek* held that SLUSA preclusion could not be circumvented because the "essence" or "substance" of the plaintiffs' complaint rested upon an untrue statement or substantive omission of material fact in connection with the purchase or sale of a covered security. *Id.* at 880.

Although ignored by the petition, the law in four other circuits is to the same effect. *See Anderson*, 521 F.3d at 1286 (Tenth Circuit joins "courts [that] have

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[5] In any event, *Kircher* would be irrelevant to any claimed circuit conflict because this Court vacated the decision for lack of jurisdiction over the district court's remand order. *Kircher*, 547 U.S. at 648. Petitioners suggest (Pet. 25-26) that this Court should grant review because the propriety of SLUSA dismissal in *Kircher* is now before the Illinois Appellate Court, but the pendency of that action simply confirms the prematurity of certiorari review at this juncture.

generally held that SLUSA precludes those claims – regardless of how artfully or cleverly plaintiffs attempt to plead them"); *U.S. Mortgage*, 494 F.3d at 842 (Ninth Circuit joining "other circuits that have considered the issue [and] have not allowed a plaintiff class to amend its way around a SLUSA dismissal, at least where the amended complaint, 'fairly read,' still contains allegations of fraud or deception involving a covered security"); *Miller*, 391 F.3d at 702 (Fifth Circuit concludes that SLUSA preclusion "hinges on the content of the allegations – not on the label affixed to the cause of action"); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1096 (11th Cir. 2002) (focusing on what complaint "implicitly alleged"), *cert. denied*, 539 U.S. 927 (2003).

b. Petitioners allege (Pet. 15-17) a conflict based on the Third Circuit's decision in *LaSala v. Bordier et Cie, supra*. That argument fails for two reasons. First, *LaSala* involved the very different and unique questions of (i) whether state-law claims that are pressed by a corporation's bankruptcy trustee on behalf of the corporation fall within a "covered class action" under SLUSA, 519 F.3d at 132-137, and (ii) whether SLUSA precludes *foreign* law claims, *id.* at 137-142. The holdings in that case thus bear little resemblance to the SLUSA questions presented here.

Second, and in any event, the Third Circuit's discussion of SLUSA preclusion echoed the approach taken by each of the other courts of appeals. Just like the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, the Third Circuit explained that "plaintiffs cannot avoid SLUSA by merely altering the legal theory that makes that misrepresentation actionable" when a

misrepresentation remains an essential predicate of the claim based on either the "implicit or explicit" allegations of the complaint. *Id.* at 141 ("[W]hen an allegation of misrepresentation in connection with a securities trade, implicit or explicit, operates as a factual predicate to a legal claim," SLUSA preclusion applies.). Thus, the Third Circuit concluded that SLUSA bars "state-law-based suits that, no matter how pleaded, *in essence* allege securities fraud." 519 F.3d at 128 (emphasis added).

Confirming the point, *LaSala* relied upon the Third Circuit's earlier decision in *Rowinski*, *supra*, which held, in language that parallels the holding of each of the other circuits, that plaintiffs cannot evade SLUSA's bar by "artful pleading," 398 F.3d at 300. As elsewhere, the "question" in the Third Circuit "is not whether a plaintiff pleads or omits certain key words or legal theories, but rather whether a reasonable reading of the complaint evidences allegations of" a SLUSA-barred claim, *id.* at 304. *See LaSala*, 519 F.3d at 128 (following *Rowinski*). Further underscoring the absence of any circuit conflict, *Rowinski* expressly cited and followed the Eighth Circuit's decision in *Dudek* and the Eleventh Circuit's decision in *Behlen*. *See* 398 F.3d at 301, 304.

Indeed, while petitioners rely upon the different verbal formulations that courts have used to describe their substantive inquiry into a complaint's allegations in the SLUSA preclusion context, petitioners do not contend that those differences in articulation have resulted in any material variation in outcomes. *See* Pet. 21-22 (arguing only that the analysis "might have been different" in one case).

More importantly, petitioners do not contend that *their cases* would have been resolved any differently in any other circuit. *LaSala*'s explanation, following *Rowinski*, that the Third Circuit focuses on what a complaint "in essence allege[s]," 519 F.3d at 128, demonstrates that petitioners would fare no better in the Third Circuit than they did in the Fourth Circuit.

Instead, petitioners advocate (Pet. 23) a mechanistic review of the "party's pleadings" that stops at the face of the complaint and ignores any fair or realistic reading of the claims. Every court of appeals has rejected that approach in SLUSA cases, and there is no need for this Court to grant review simply to reiterate the artful pleading rule that has been faithfully and consistently applied by the courts of appeals in SLUSA cases, consistent with congressional direction.

3. The court of appeals correctly affirmed the district court's decision. No matter how artfully pleaded, the essential predicate of petitioners' complaints is that the Companies mispriced certain securities, which led to their artificial inflation or deflation in value. Those allegations that the Companies "cause[d] the [securities' value] to be either artificially high or artificially low," Pet. App. 30a, 49a, 94a; *see id.* at 69a-71a, are functionally indistinguishable from a claim that the Companies misrepresented the true value of the securities, as the district court found petitioners themselves had conceded. Pet. App. 16a n.10. Petitioners' complaints also, at a minimum, rest on the allegation that the Companies failed to disclose material facts by failing to alert shareholders to the alleged market-timing problem and its impact on the value of their

securities. *Id.* at 16a-17a. Whatever the label, those claims are precluded by SLUSA.

Finally, review of the SLUSA issue would do nothing to help petitioners because the complaints are also preempted by the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* That Act prescribes the manner in which funds must value the securities in their portfolios, 15 U.S.C. § 80a-2(a)(41)(B), and preempts the field in that area, 15 U.S.C. § 80a-49. In addition, the 1940 Act vests regulatory control over the valuation of securities in private securities associations and, ultimately, the SEC. 15 U.S.C. § 80a-22(a),(c); *see United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 710 n.19 (1975). Neither the court of appeals nor the district court reached that question. Pet. App. 7a n.2, 14a n.8.[6]

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[6] Moreover, to the extent the purported negligence claims simply allege mismanagement by corporate officials, they "likely would need to be cast as a derivative action, which none of these suits purports to be." *Kircher*, 403 F.3d at 483.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE
Supreme Court of the United States

MATTHEW WIGGENHORN, ET AL.,
Petitioners,

v.

AXA EQUITABLE LIFE INSURANCE COMPANY
FORMERLY KNOWN AS EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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A deep conflict exists among the circuits regarding when SLUSA bars state law claims which do not include explicit allegations of misrepresentations or omissions of material fact. In spite of the Court's request for respondents to file a brief, respondents still make no effort to address the circuit conflict, the widespread confusion among the federal courts, or the appropriateness of this Court's resolution of the conflict on the undisputed factual record presented by this case. Respondents acknowledge "differences in articulation" of the "substantive inquiry" the courts of appeals undertake to assess whether a claim is an attempt to artfully plead around SLUSA; but they attempt to pass off these differences as merely "different verbal formulations" that are not outcome-determinative. Opp. 12-13. Respondents do not discuss what those acknowledged "differences" are or how those "differences" are merely different ways of saying the same thing — and for good reason. The courts of appeals are actually poles apart on this important issue.

Instead of addressing the circuit conflict, respondents focus on the circuit unanimity for the non-controversial principle that a plaintiff may not "artfully plead" around SLUSA. Respondents ignore the fact that the agreement ends there. The circuit tests for determining whether a plaintiff's allegations are an "artful" attempt to dodge SLUSA are in hopeless conflict.

At one end, the Third Circuit has held that deceit must be a "factual predicate" of the claim actually pleaded to trigger SLUSA. The Seventh Circuit has staked out the opposite extreme, holding that a claim need only be susceptible of being recast as a claim of deceit: if the plaintiff's claim "could have" been cast as a deception claim, that is sufficient to trigger SLUSA. The Fourth and

Eighth Circuits' rationales are vague, but both circuits seem to follow the rule that if a plaintiff has previously asserted a deception-based claim, SLUSA bars subsequent claims, even when the plaintiff unconditionally abandons that claim in favor of a claim not predicated on deception.

Respondents' unexplained insistence that these admitted "differences" are not outcome-determinative conflicts is disingenuous. This Court's review is essential to restore uniformity to the circuits' irreconcilably divergent interpretations of the Securities Litigation *Uniform* Standards Act of 1998.

I. The Circuits Are Deeply Divided In Assessing When A Complaint Lacking Explicit Allegations Of Misrepresentation Violates SLUSA.

A. The Third And Fourth Circuits' Approaches Are Irreconcilable.

Respondents' attempt to harmonize the Fourth Circuit's holding with the Third Circuit's decision in *LaSala v. Bordier et Cie*, 519 F.3d 121 (3d Cir. 2008), is entirely unconvincing. Respondents claims that the cases are not in conflict simply because both circuits agree a plaintiff cannot "artfully plead" around SLUSA.[1] No court has disagreed with that general proposition nor do petitioners. The circuit conflict involves the imple-

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[1] Respondents initially attempt to dismiss *LaSala*'s holdings as involving "very different and unique questions" that "bear little resemblance to the SLUSA question presented here." Opp. 11. That claim is meritless. The "factual predicate" discussion in *LaSala*, 519 F.3d at 141, directly addresses the precise SLUSA-pleading question presented here, as at least one court has recognized. *See In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 551 (N.D. Cal. 2009) (relying on *LaSala*'s factual predicate test).

mentation of that general principle, and the circuit approaches are starkly different.

The Third Circuit holds that SLUSA's misrepresentation "ingredient" is present only "when an allegation of misrepresentation in connection with a securities trade, implicit or explicit, operates as a factual predicate to a legal claim." *LaSala*, 519 F.3d at 141. "To be a factual predicate, the fact of a misrepresentation must be one that gives rise to liability." *Id.* When a misrepresentation or omission is a factual predicate of a legal claim, a plaintiff's omission of that allegation is "artful pleading," and SLUSA bars the claim.

By contrast, the Fourth Circuit held that petitioners' claim "that Defendants negligently exposed [petitioners'] investments to the dilution effect of market timing" runs afoul of SLUSA. Pet. App. 5a. The same district judge who dismissed these cases (which are part of a multidistrict proceeding involving numerous other market timing cases), recently vindicated petitioners' position that their claims are negligence claims, not fraud: "Even if plaintiffs are correct that Janus should have implemented [practices] ... and established written policies [to curb market timing], *plaintiffs would only prove a case of negligence or corporate mismanagement — not a fraud claim.*" *In re Mutual Funds Inv. Litig.*, MDL No. 04-MD-15863, at *3 2009 WL 1725976 (D. Md. June 12, 2009) (emphasis added). When petitioners' negligence claims were before the district judge, however, he ruled they were "at bottom" fraud claims. Pet. App. 16a.

Because petitioners' claims are properly viewed as negligence claims, it is unsurprising the Fourth Circuit identified no misrepresentation, explicit or implicit, that was the "factual predicate" of their

negligence claims. In fact, petitioners explicitly alleged that respondents "did ***not*** make an untrue statement, fail to disclose any material fact or use or employ any manipulative or deceptive device or contrivance." Pet. App. 33a, 52a, 98a. Thus, had the Fourth Circuit applied the Third Circuit's "factual predicate" test to petitioners' allegations, the court could not have concluded that SLUSA bars petitioners' negligence claims.

Although the Fourth Circuit offered no rationale consistent with the Third Circuit's approach, respondents attempt to do so. According to respondents, "the essential predicate of petitioners' complaints is that the Companies mispriced certain securities," which respondents say is "functionally indistinguishable from a claim that the Companies misrepresented the true value of the securities." Opp. 13. That, however, distorts both the undisputed facts and petitioners' claims.

It is undisputed that variable annuities are not priced or traded like stocks traded on an exchange. Instead, respondents calculate the price of their variable annuities only once per day after the close of trading at 4:00 p.m. Pet. App. 26a. As a result, when investors place their trade orders throughout the course of the day, they do not know the exact price at which their trades will be executed, because their trade orders are also executed only once per day after the close of trading at 4:00 p.m. Pet. App. 26a. Once the new daily price is calculated, that day's trade orders are then executed.

Petitioners allege that when respondents execute a market timer's purchase order at a negligently calculated price, existing investors are injured at that moment by that act. The market timer's purchase at a bargain price dilutes the in-

vestments of all existing investors. Pet. App. 31a-32a. Neither respondents' negligent calculation of the price nor petitioners' economic injury depends on any representation (or *mis*representation) of the price to anyone. It is undisputed that both respondents' negligent calculation of the price and petitioners' injury occur hours before the new daily price is ever published or represented to anyone.[2] Because no representation plays any role in petitioners' injury, a misrepresentation cannot be a factual predicate of petitioners' claims for that injury. Respondents' attempt to square the Fourth Circuit's holding with *LaSala* therefore fails.

B. The Circuits Are In Disarray In Their Approaches And Need This Court's Guidance.

Respondents portray the circuits as being in harmony on "the SLUSA-pleading question." Opp. 6-7. As noted, however, the circuits agree only at the most general level that a plaintiff may not "artfully plead" around SLUSA. The circuits are deeply divided regarding how to determine when a complaint lacking explicit allegations of misrepresentation violates SLUSA. That is the actual "SLUSA-pleading question" these cases present — and which respondents never discuss.

The artful pleading doctrine was developed long before the enactment of SLUSA in the context of federal question jurisdiction. *See Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 474-75 (1998) (discussing evolution of artful pleading doctrine).

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[2] In addition, when the price is eventually published hours later, it is not a misrepresentation. It is the true per-unit price respondents calculated, and it is the actual per-unit price at which respondents executed all trade orders.

Under that doctrine, "a plaintiff may not defeat removal [jurisdiction] by omitting to plead necessary federal questions." *Id.* at 475 (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 14 (1983)).

SLUSA prohibits a plaintiff in a state-law class action from "alleging an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b); *accord id.* § 78bb(f)(1). Thus, applying the artful pleading doctrine in the SLUSA context, a plaintiff may not defeat SLUSA by omitting to allege an untrue statement or omission necessary to the properly pleaded state law claim. Conversely, if an untrue statement, misrepresentation or omission is *not* necessary to the properly pleaded state law claim, SLUSA does not bar the claim. Such a necessary allegation of an untrue statement, misrepresentation or omission is what the Third Circuit refers to as a "factual predicate." *LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir. 2008). *See Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F.Supp.2d 258, 266 (S.D.N.Y. 2004) (applying a similar "necessary component" test).

The Third Circuit's "factual predicate" test is thus a faithful application of the artful pleading doctrine in the SLUSA context. It is not a "mechanistic review of the 'party's pleadings' that stops at the face of the complaint and ignores any fair or realistic reading of the claims," and contrary to respondents' assertion, petitioners do not advocate such a "mechanistic" approach. Opp. 13. However, the review SLUSA requires must at least *begin with* a review of a complaint's allegations, which the Fourth, Seventh and Eighth Circuits' approaches do not.

As explained in the petition, the Seventh Circuit has taken the view that allegations not found in a complaint, but instead hypothesized by a court, are sufficient to trigger SLUSA. *Kircher v. Putnam Funds Trust*, 403 F.3d 478, 484 (7th Cir. 2005), *vacated on jurisdictional grounds*, 547 U.S. 633 (2006). ("Suppose the funds stated in their prospectuses that they took actions to prevent arbitrageurs from" market timing; "[t[hat statement, if false (and known to be so), could support [an SEC] enforcement action"). In the Seventh Circuit's view, simply because the plaintiffs "could have" — with the addition of the hypothetical allegations — "brought [their claims] directly under Rule 10b-5 in federal court," they must necessarily be viewed as fraud claims barred by SLUSA. *Id.*

The Seventh Circuit's approach is not only at odds with the Third Circuit's "factual predicate" test, it is also inconsistent with SLUSA which bars claims on the basis of what a plaintiff is actually "alleging," not on the basis of what a plaintiff "could have" alleged. Furthermore, the *Kircher* approach flatly contradicts this Court's precedents: "The 'artful pleading' doctrine cannot be invoked" "on the basis of facts not alleged in the complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 397 (1987).

Respondents do not seriously attempt to defend the Seventh Circuit's reliance on hypothetical allegations. Instead, respondents dismiss *Kircher* as "irrelevant to any claimed circuit conflict because this Court vacated the decision for lack of jurisdiction." Opp. 10 n.5 (citing *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 648 (2006)). Subsequent to this Court's decision in *Kircher*, however, the Seventh Circuit reaffirmed its SLUSA analysis in that vacated decision, explaining that the Supreme Court "agreed with" its "substantive ap-

proach" in *Kircher* but "concluded that we lacked appellate jurisdiction and v. ated our judgment accordingly." *In re Mut. Fund Market-Timing Litig.*, 468 F.3d 439, 441 (7th Cir. 2006) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006)). The Seventh Circuit's *Kircher* decision thus continues to be very relevant to the circuit conflict.

Respondents do not attempt to reconcile the Eighth Circuit's decision in *Dudek v. Prudential Sec., Inc.*, 295 F.3d 875 (8th Cir. 2002), with the Third Circuit's "factual predicate" test, nor could they credibly do so. As explained in the petition, the plaintiffs sued Prudential for breaching their fiduciary duty by charging excessive fees, and their complaint lacked any explicit allegations of misrepresentation or non-disclosure, although the plaintiffs had previously made such allegations in an earlier lawsuit. Pet. 20 (quoting *Dudek*). The Eighth Circuit did not attempt to explain how the claims in the complaint before it were necessarily predicated on misrepresentations or omissions. 295 F.3d at 879-80. As the Fourth Circuit (and the district court) did here, the Eighth Circuit just conclusorily declared that the "substance" and "essence" of the unquoted complaint amounted to "artfully concealed" allegations of misrepresentation or omission. *Id.*

Respondents cite four other cases from the Fifth, Ninth, Tenth and Eleventh Circuits ("ignored by the petition" (Opp. 10)), once again for the general proposition that SLUSA precludes claims of misrepresentation or omission "regardless of how artfully or cleverly plaintiffs attempt to plead them." *Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1286 (10th Cir. 2008). In three of those cases, the courts had no occasion to apply the artful pleading doctrine,

however, because each involved explicit allegations of misrepresentation or omission; the plaintiffs had not omitted such allegations in an attempt to artfully plead around SLUSA.[3] Consequently, those three cases are irrelevant to the circuit conflict here.

The fourth case also sheds little light on this issue. In *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1089, 1094 (11th Cir. 2002), the plaintiff explicitly alleged misrepresentations and omissions, allegations he later abandoned. It may be that the Eleventh Circuit's decision in *Behlen* is one more instance of a circuit court unduly expanding SLUSA's scope, like the Eighth Circuit did in *Dudek* and the Fourth Circuit has done here. The Eleventh Circuit strongly suggests (as does *Dudek*) that allegations of *any* kind of "misconduct" can trigger SLUSA, *id.* at 1096, even though the only "misconduct" SLUSA addresses is *deceptive* misconduct.

What distinguishes *Behlen*, however, is that it appears the plaintiff merely deleted his misrepresentation claim and deleted other explicit allegations of fraud and omission while simultaneously retaining the exact same underlying theory of the case, which was based on deception. If that was indeed what happened, then *Behlen* is a text-book example of genuine "artful pleading." If anything,

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[3] *Anderson*, 521 F.3d at 1283 ("Plaintiffs made several allegations in their Complaint regarding 'misrepresentation[s] or omission[s] of a material fact'"); *U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 840 (9th Cir. 2007) (amended complaint alleges that defendant "made material misrepresentations concerning the financial status of the company"); *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 702 (5th Cir. 2004) (complaint "alleges 'untrue statement[s]' and 'omission[s]'").

the ambiguity of *Behlen* — resulting from the Eleventh Circuit's failure to carefully parse the plaintiff's allegations like the Third Circuit did in *LaSala* — supports granting the petition here.

II. Respondents Offer No Meritorious Reason For Denying the Petition.

To shore up their claim that there is no circuit split, respondents resort to analysis-by-label. First, respondents describe the Fourth Circuit's analysis as "record-bound," but they fail to explain that assertion or how a decision by this Court would resolve only this case and no others. This Court's decision on the proper mode of analyzing a complaint under SLUSA would be of immense benefit in the numerous market timing cases pending below in the MDL proceeding from which these cases came. Additionally, the conflicting circuit decisions demonstrate that the issue is an oft-recurring one. Respondents offer no reason to doubt that the impact of this Court's decision extends far beyond the present case, and their claim that the Fourth Circuit's analysis is "record-bound" is not credible.

Respondents also emphasize that the Fourth Circuit's decision is "unpublished," suggesting that this diminishes the importance of the decision. A cursory review of Fourth Circuit case law, however, reveals that the Fourth Circuit cites and relies upon its own unpublished opinions regularly.[4] Thus, the decision's "unpublished" designa-

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[4] *See, e.g.*, *Cochran v. Holder*, 564 F.3d 318, 321 (4th Cir. 2009) (citing *Scott v. Stone*, 945 F.2d 398 (4th Cir. 1991) (unpublished)); *Wahi v. Charleston Area Med. Center, Inc.*, 562 F.3d 599, 617 (4th Cir. 2009) (citing *Barclay White Skanska, Inc. v. Battelle Mem'l Inst.*, 262 Fed.Appx. 556 (4th Cir. 2008)); *United States v. Uribe-Rios*, 558 F.3d 347, 352, 358 (4th Cir. 2009) (citing *United States v. Almendarez*,

tion does not detract from the need for this Court's review.

Finally, in the closing paragraph of their brief, respondents contend the Court should deny certiorari because petitioners will ultimately lose on other grounds. Specifically, respondents contend that the Investment Company Act of 1940 "preempts the field" of law governing plaintiffs' claims, an issue which *neither* of the courts below addressed. Opp. 14. Even were there some colorable merit to respondents' "field preemption" argument, that would be no ground for denying certiorari on the question presented under a wholly unrelated statute. The argument, however, is utterly meritless.

The ICA itself provides: "nor shall anything in this subchapter affect the jurisdiction of ... any State or political subdivision of any State, over any person, security, or transaction, insofar as such jurisdiction does not conflict with any provision of this subchapter or of any rule, regulation, or order hereunder." 15 U.S.C § 80a-49. This Court has also held that the ICA does "not require that federal law displace state laws ... unless the state laws permit action prohibited by the Act[], or unless 'their application would be inconsistent with the federal policy ....'" *Burks v. Lasker*, 441 U.S. 471, 479 (1979). *See also Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 225-26 (3d Cir. 2001) (holding that ICA did not preempt state law claims because ICA was intended to supplement state law, not displace it). Respondents' "field pre-

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1 Fed.Appx. 234 (4th Cir. 2001) and *United States v. Ferguson*, 48 F.3d 1217 (4th Cir. 1995) (unpublished)); *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 302 n.9 (4th Cir. 2009) (citing *Hanson v. Cerrone & Assoc., Inc.*, 1993 WL 98777 (4th Cir. 1993)).

emption" argument is no basis for denying certiorari.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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